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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

JOAQUIN MARIO SERNA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Speedy Trial Clause of the Sixth Amendment apply to a delay prior to arrest when the defendant is unaware that charges have been filed and is not available for prosecution?

2. Was the holding in *United States v. Marion* intended to suggest that the filing of a complaint and issuance of an arrest warrant invokes the protection of the Speedy Trial Clause in a misdemeanor case?

3. Can a state statute of limitations period be used to define the length of delay which satisfies the threshold requirement of presumptively prejudicial delay described in *Barker v. Wingo*?

4. In conducting the balancing test set forth in *Barker v. Wingo*, must actual prejudice to the defendant be presumed from a one-year delay?

ADDITIONAL PARTIES

In addition to the parties listed in the caption, the Superior Court of Los Angeles County was designated as a party in the court below and the Municipal Court of the Los Angeles Judicial District was named as a party in respondent's original petition for a writ of mandate. These courts, however, have not made an appearance either in writing or at oral argument at any stage of the proceedings below and appear not to have a sufficient interest to warrant being named as parties in the instant proceedings.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
ADDITIONAL PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
1. THE DECISION BELOW MISCONSTRUES THIS COURT'S OPINION IN *UNITED STATES V. MARION* AND WRONGLY CONCLUDES THAT THE FILING OF A MISDEMEANOR COMPLAINT AND ISSUANCE OF AN ARREST WARRANT TRIGGERS THE SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WHERE THE DEFENDANT HAS NOT BEEN ARRESTED, DOES NOT KNOW CHARGES ARE PENDING, AND IS NOT AVAILABLE FOR PROSECUTION	6
2. THE OPINION BELOW WRONGLY HOLDS THAT ACTUAL PREJUDICE MUST BE PRESUMED IF THE DELAY EXCEEDS THE STATUTE OF LIMITATIONS PERIOD AND IS THUS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *BARKER V. WINGO*	15
CONCLUSION	21
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases

Page

Barker v. Wingo, 407 U.S. 514 (1972) ..... i, 4, 15-21

Craig v. Municipal Court, 100 Cal.App.3d 69 (1979) 14

Gray v. King, 724 F.2d 1199 (5th Cir. 1984) 18

Look v. Amaral, 725 F.2d 4 (1st Cir. 1984) 19

Moore v. Arizona, 414 U.S. 25 (1973) 17

Serna v. Superior Court, 40 Cal.3d 239 (1985) as modified at 40 Cal.3d 702a ..... passim

United States v. Crow Dog, 532 F.2d 1182 (8th Cir. 1976) 19

United States v. Frazier, 584 F.2d 790 (6th Cir. 1978) 19

United States v. Gouveia, ____ U.S. ____, 52 U.S.L.W. 4659 (May 29, 1984) 10

United States v. Greene, 578 F.2d 648 (5th Cir. 1978) 19

United States v. Guerrero, 756 F.2d 1342 (9th Cir. 1984) 20

United States v. Hay, 527 F.2d 990 (10th Cir. 1975) 13

United States v. Jackson, 542 F.2d 403 (7th Cir. 1976) 19, 20

United States v. Jenkins, 701 F.2d 850 (10th Cir. 1983) 19

United States ex rel. Little v. Twomey, 477 F.2d 767 (7th Cir. 1973) 20

United States v. Loud Hawk, et al., ____ U.S. ____ (January 21, 1986) 9, 10, 16, 17

United States v. Loud Hawk, et al., 741 F.2d 1184 (9th Cir. 1984), overruled ____ U.S. ____ (January 21, 1986) 20

United States v. MacDonald, 456 U.S. 1 (1982) ..5, 10, 11

Table of Authorities

Cases

Page

United States v. Marion, 404 U.S. 307 (1971) ..... passim

United States v. U.S. Treasury Bills, 750 F.2d 900 (11th Cir. 1985) 19

United States v. Washington, 504 F.2d 346 (8th Cir. 1974) 13

United States v. Watson, 599 F.2d 1149 (2d Cir. 1979) 12, 13

Constitutions and Statutes

California Constitution, Art. I, Sec. 15 3

United States Constitution, Fifth Amendment 10

United States Constitution, Sixth Amendment ... passim

28 U.S.C. § 1257(3) 2

California Penal Code:

Section 17(b)(4) 2

Section 245 2

Section 459 2

Section 470 2

Section 487 2

Section 508 2

Section 801 18

Section 813 11

Section 1427 11

Miscellaneous

Judicial Council of California 1985 Annual Report, p. 134 14

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the California Supreme Court is published as *Serna v. Superior Court,* 40 Cal.3d 239 (1985), and appears in the appendix hereto at page A-1. The order of the California Court of Appeal, Second Appellate District, Division Four, was not published but appears in the appendix at page A-58. No opinion was issued by the Superior Court of California, County of Los Angeles, but a copy of the court's minutes is included in the appendix at page A-59. No opinion was rendered by the Municipal Court of the Los Angeles Judicial District.

JURISDICTION

The judgment of the California Supreme Court was entered on October 24, 1985. A timely petition for rehearing was denied on December 19, 1985, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .

STATEMENT OF THE CASE

On September 8, 1978, respondent Joaquin Serna was working the night shift as a gas station attendant. After his shift ended, it was discovered that $955 in cash which had been received for sales during his shift had not been deposited in the safe and was missing. Serna never returned to work. He had borrowed his mother's car the night before the theft and was believed to be heading for Florida. (*Serna v. Superior Court*, 40 Cal.3d 239, 247-248 (1985); Appendix [hereinafter App.], *infra*, A-4 to A-6.)

On September 29, 1978, a misdemeanor complaint was filed charging Serna with embezzlement in violation of California Penal Code section 508.[1] A warrant was issued for his arrest.

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[1]Under California law, embezzlement is one of many serious crimes which may be prosecuted as either a felony or a misdemeanor at the discretion of the prosecutor. (California Penal Code section 17(b)(4).) This class of offenses, termed "wobblers," includes assault with a deadly weapon, second degree burglary, grand theft, and forgery. (California Penal Code sections 245, 459, 487, 470.)

Serna was not arrested until February 15, 1983, over four years later. On April 25, 1983, he filed a written motion to dismiss for lack of speedy prosecution which expressly relied on the Sixth Amendment to the United States Constitution as well as article I, § 15 of the California Constitution. The motion included a declaration of Joaquin Serna stating that respondent had no knowledge of the charges prior to his arrest. The Municipal Court denied respondent's motion to dismiss on May 16, 1983. The trial court judge specifically rejected both the federal and state claims.

On June 15, 1983, Serna filed a petition for writ of mandate in the Superior Court, again relying on the protections of both the United States and California Constitutions. The petition was denied on September 22, 1983. (Minutes of the Superior Court of California, App., *infra*, A-59.)

On September 28, 1983, Serna filed a petition for writ of mandate in the California Court of Appeal, Second Appellate District, again raising the same arguments. This petition was summarily denied on December 20, 1983. (Order of the California Court of Appeal, App., *infra*, A-58.)

A petition for hearing was then filed in the California Supreme Court on December 30, 1983. On January 26, 1984, the California Supreme Court granted a hearing and ordered that an alternative writ of mandamus issue. The People filed an answer, Serna filed a traverse, and the cause was argued on October 12, 1984.

The California Supreme Court issued its opinion on October 24, 1985. Finding no basis for relief under the California Constitution, the court turned to a determination of "the time at which an accused misdemeanant's right to a speedy trial under the Sixth Amendment to the

United States Constitution attaches." (*Serna v. Superior Court, supra* at 245; App., *infra*, A-2.) Basing its decision solely on federal grounds, the court held that "opinions of the United States Supreme Court state, without qualification as to the level of offense charged, that the right attaches with the filing of the accusatory pleading or arrest, whichever is first." (*Id.*) Accordingly, the court held that "when an offense is charged as a misdemeanor it is the filing of the complaint (or earlier arrest) which triggers the defendant's Sixth Amendment right to a speedy trial." (*Id.*)[2] The opinion went on to hold that "a delay between the filing of a misdemeanor complaint and the arrest and prosecution of a defendant which exceeds the statutory period of limitation is unreasonable and presumptively prejudicial . . . ." (*Id.* at 253; App., *infra*, A-15.) The court thus held that a delay which is longer than one year not only satisfies the threshold requirement which triggers a full Sixth Amendment review pursuant to *Barker v. Wingo*, 401 U.S. 514, 530 (1972), but also requires that it be presumed that the defendant suffered actual prejudice.

In a dissenting opinion joined by Justice Kaus, Justice Lucas noted that

> The United States Supreme Court has never extended speedy trial rights to prearrest delays and our own court has held that the filing of a criminal complaint does not trigger the federal speedy trial guarantee. (*Id.* at 270; App., *infra*, A-44.)

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[2]The opinion also addresses a procedural issue concerning the standard of review for the denial of a petition for writ of mandate and ruled that respondent's speedy trial claim under the California Constitution had been properly denied because Serna had failed to demonstrate that he had suffered actual prejudice. Therefore, the decision of the court below was clearly not based on the California Constitution but solely on federal grounds.

The conclusion of the dissent that the Sixth Amendment was not applicable was based in part on this Court's decision in *United States v. MacDonald,* 456 U.S. 1 (1982):

> *MacDonald* establishes that not all criminal accusations automatically trigger the protections of the speedy trial provision. The only ones so affected are those that present a realistic possibility of (1) pretrial incarceration, (2) anxiety to the accused, or (3) public scorn arising from widespread knowledge of the charges. (*Id.* at 271, App., *infra,* A-45.)

Both petitioner and respondent filed timely petitions for rehearing. The prosecution pointed out that the opinion had failed to recognize that while the statute of limitations for most misdemeanor offenses was one year, the limitations period was three years for the most serious misdemeanor offenses, such as that in the instant case, which could be prosecuted as either felonies or misdemeanors.

On December 19, 1985, the California Supreme Court denied rehearing but modified the opinion to state that prejudice would be presumed where the delay between the filing of a misdemeanor complaint and the arrest of the defendant exceeded the one-year limitations period applicable to most misdemeanor offenses regardless of the statute of limitations for the offense actually charged. The court thus modified the above-quoted portion of their opinion to read "that a delay between the filing of a misdemeanor complaint and the arrest and prosecution of a defendant which exceeds one year is unreasonable and presumptively prejudicial. . . ." (Order of the California Supreme Court; App., *infra,* A-61; Modification of Opinion published at 40 Cal.3d 702a (1985); App., *infra,* A-54.)

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW MISCONSTRUES THIS COURT'S OPINION IN *UNITED STATES V. MARION* AND WRONGLY CONCLUDES THAT THE FILING OF A MISDEMEANOR COMPLAINT AND ISSUANCE OF AN ARREST WARRANT TRIGGERS THE SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WHERE THE DEFENDANT HAS NOT BEEN ARRESTED, DOES NOT KNOW CHARGES ARE PENDING, AND IS NOT AVAILABLE FOR PROSECUTION.

The instant case presents the important question, never directly addressed by this Court, of whether the Speedy Trial Clause of the Sixth Amendment applies to a delay before the defendant has been arrested or is otherwise available for prosecution. A related issue of first impression is whether the right to a speedy trial attaches upon the filing of a misdemeanor complaint and issuance of an arrest warrant. The rationale of this Court's Sixth Amendment decisions compels the conclusion that the Speedy Trial Clause does not apply to a delay in effectuating an arrest. Nevertheless, the California Supreme Court has ruled that a delay between the filing of a misdemeanor complaint and the arrest of the defendant can violate the right to a speedy trial under the Sixth Amendment.

In reaching their erroneous result, the court below relied on some ambiguous language used in this Court's opinion in *United States v. Marion,* 404 U.S. 307 (1971). It is therefore important that this Court clarify the meaning of this frequently quoted language.

In every case previously considered by this Court in which the Sixth Amendment right to a speedy trial was found to apply, the defendant had either been arrested or

knew that charges were pending. In each case the prosecution had begun and the defendant was actively engaged in his defense. For example, in *United States v. Marion, supra,* the seminal decision discussing when the right to a speedy trial attaches, an indictment had been issued and the defendant was available for prosecution. The defendant in *Marion* argued that a delay in returning the indictment violated his right to a speedy trial. In ruling that the Sixth Amendment right to a speedy trial was not applicable prior to the issuance of an indictment, this Court first studied the language and history of the Speedy Trial Clause and concluded that the protection of the Amendment is activated only when a criminal prosecution has begun . . ." and observed that related speedy trial protections did not apply to delay prior to the arrest of the defendant. (*Id.* at 313, 314 n. 6, 319.) Next, the opinion turns to a careful examination of the purposes of the Sixth Amendment's speedy trial provision. In describing the "major evils protected against by the speedy trial guarantee," this Court was concerned with whether a delayed trial would actually disrupt the defendant's life and focused on the importance of the fact that an arrest had occurred:

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. (*Id.* at 320.)

However, the opinion concludes in rather general language that "it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." (*Id.*) While this language suggests

that the Speedy Trial Clause could apply to a delay before the defendant has been located and arrested, the paragraph immediately following again stresses that the point of arrest is crucial:

> But we decline to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusations: his situation does not compare with that of a defendant who has been arrested and held to answer.

Ignoring this emphasis on the fact of arrest and its implications for the defendant and relying solely on the somewhat ambiguous language used to state the holding in *Marion,* the California Supreme Court held that the filing of a complaint and the issuance of an arrest warrant in a misdemeanor case triggers the Sixth Amendment right to a speedy trial even though the defendant has not been arrested, is unaware that charges are pending, and is not available for prosecution.[3] In the instant case, Serna disappeared immediately after the crime occurred. A misdemeanor complaint was filed and an arrest warrant issued but it was not until defendant was arrested that he first learned that charges were pending and became available for prosecution.[4] Under such circumstances the interests the Sixth Amendment was intended to protect are

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[3]To quote the opinion below:

> [O]pinions of the United States Supreme Court state, without qualification as to the level of offense charged, that the right [to a speedy trial] attaches with the filing of the accusatory pleading or arrest, whichever is first. (*Serna v. Superior Court,* 40 Cal.3d 239, 245 (1985); App., *infra,* A-2.)

[4]The decision below acknowledges that Serna presented "a declaration in which he stated that he had no knowledge of the charge prior to the date of his arrest . . . ." (*Id.* at 247; App., *infra,* A-5.)

not implicated. There is no need "to prevent undue and oppressive incarceration . . . ." Nor is it possible "to minimize anxiety and concern accompanying public accusation . . ." when the defendant is unaware that charges have been filed.[5] Further, since no arrest has yet occurred, there is no interference with the defendant's liberty. His employment is not disrupted, his finances are not drained, and he could not be subjected to public obloquy or anxiety.

This Court's most recent decision in this area reemphasized that in determining whether the right to a speedy trial is applicable, the primary focus must be on whether the defendant has suffered a restriction on his liberty. In *United States v. Loud Hawk, et al.*, ____ U.S. ____ (January 21, 1986), it was determined that the time during which the prosecution appealed the dismissal of an indictment would not be counted in determining whether a speedy trial was denied. Paramount in this Court's reasoning was the fact that during this period the defendant's liberty was unimpaired. The opinion states:

> [T]he Speedy Trial Clause's core concern is impairment of liberty; it does not shield a suspect or a defendant from every expense or inconvenience associated with criminal defense.
>
> We therefore find that under the rule of *MacDonald*, when defendants are not incarcerated or subjected to other substantial restrictions on their liberty, a court should not weigh that time towards a claim under the Speedy Trial Clause.

In the instant case, Serna was neither incarcerated nor subjected to any restriction on his liberty during the

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[5]If the defendant were aware of the charges but was avoiding arrest, he could not be heard to complain of the resulting delay.

period prior to arrest. Being unaware of the charges, Serna suffered none of the ills which the Sixth Amendment was designed to redress.

The recognition in *Loud Hawk* that impairment of liberty is the core concern of speedy trial protections is not new. In *United States v. MacDonald,* 456 U.S. 1, 8 (1982), this Court recognized that

> The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges. (See also *United States v. Gouveia,* ____ U.S. ____, 52 U.S.L.W. 4659, 4661 (May 29, 1984).)

None of these concerns applies in the instant case. Prior to his arrest, defendant's liberty was not impaired and his life was not disrupted. This is not to say that delay in effectuating an arrest might not impair the defendant's ability to prepare a defense and thus deny him a fair trial. But such concerns are more properly addressed within the ambit of the Due Process Clause of the Fifth Amendment. (*United States v. Marion, supra,* at 321, 324.)

Rather than carefully consider the reasoning of the decision in *Marion* to determine if the Speedy Trial Clause was applicable in this case, the court below narrowly focused on language in *Marion* stating that the Sixth Amendment right attaches when the defendant "in some way becomes an 'accused,' " or upon the filing of an "indictment, information, or other formal charge." (*Serna v. Superior Court, supra,* 40 Cal.3d at 256; App., *infra,* A-20.) The California Supreme Court reasoned in mechanical fashion that since a misdemeanor complaint is

a "formal charge" the right to a speedy trial must attach upon its filing.

The statement in *Marion* that the speedy trial clause applies to delays following either a formal indictment or information was not meant to create a mere formalism to be applied unthinkingly. The basis for the result in *Marion* is that a speedy trial can be provided only after a prosecution has actually commenced. Thus delays in pre-arrest investigation are not cognizable. In the same manner, the delay in locating and arresting the defendant in the instant case does not raise a speedy trial claim. The prosecution could not actually commence until defendant was arrested.[6]

Nevertheless, despite the unequivocal import of this Court's reasoning, the opinion below demonstrates the necessity for this Court to clarify some ambiguous language in the *Marion* opinion which misled the California court. Specifically, *Marion* states that "it is either a formal indictment or information or else the actual restraints imposed by arrest" which triggers speedy trial protections. (*United States v. Marion, supra,* at 320.)

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[6]It is not accidental that this issue has arisen in the context of a misdemeanor case. Under California law, a warrant may issue for a felony offense and the defendant can be located and arrested *before* an indictment is issued. (California Penal Code section 813.) In a misdemeanor, however, an arrest warrant cannot be issued until *after* a complaint is filed. (California Penal Code section 1427.) Under such circumstances, the mere filing of a misdemeanor complaint for the purpose of obtaining a warrant does not magically invoke the protections of the Sixth Amendment. Whether or not a complaint has been filed, until the defendant is arrested, none of the considerations identified in *Marion* and *MacDonald* come into play.

Delays in serving arrest warrants are also more likely in misdemeanor cases due to their sheer numbers. As of January 1, 1986, there were 409,000 unserved misdemeanor warrants in California compared to 34,000 unserved warrants in felony cases.

While this language seems to include a delay following an indictment but prior to an arrest, the next paragraph of the opinion expressly states to the contrary: "but we decline to extend the reach of the amendment to the period prior to arrest." (*Id.* at 321.)[7] Further confusion is added because the above-quoted holding in *Marion* is expressly limited to an "indictment or information" (*id.* at 320) yet the opinion also uses the phrase "other formal charge" (*id.*) and states that the right applies when the defendant "in some way becomes an 'accused' . . . ." (*Id.* at 313.) Was this general language intended to suggest that the filing of a complaint and issuance of an arrest warrant was sufficient to invoke the protection of the Sixth Amendment? Petitioner urges this Court to accept this case to resolve these important issues.

Both the Second Circuit and Tenth Circuit of the United States Court of Appeals have recognized that even the issuance of a formal indictment does not trigger the Speedy Trial Clause if the circumstances do not threaten the evils addressed by the Sixth Amendment. Both decisions held that the return of a sealed indictment did not invoke the protections of the Sixth Amendment. The court in *United States v. Watson*, 599 F.2d 1149 (2d Cir. 1979),

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[7]Petitioner is aware, of course, that this apparent anomaly results from the fact that in many criminal prosecutions no arrest will occur because the defendant will appear in court voluntarily. This is apparently what occurred in *Marion*. Under such circumstances the issuance of the indictment triggers Sixth Amendment protections since the defendant is aware of the charge and available for prosecution. The opinion in *Marion* thus could not have stated that only an arrest invoked speedy trial protections because that would leave no protection for defendants who appear in court voluntarily. Hopefully, this Court will use the instant case as a vehicle to examine the situation not presented in *Marion* where a misdemeanor complaint is filed but the defendant is not available for prosecution.

carefully examined the reasoning used by this Court in *Marion* and concluded that

> the speedy trial right under the Sixth Amendment attaches not when a sealed indictment is filed but when it is unsealed (or when the Government arrests the defendant or otherwise apprises him of the charges against him). (*Id.* at 1156.)

The same conclusion was reached in *United States v. Hay*, 527 F.2d 990, 994 (10th Cir. 1975), in which the ruling was stated in terms which are directly applicable to the instant case:

> We do not include the time from appellant's indictment to his arrest because appellant was not available for prosecution and because none of the interests protected by the sixth amendment guarantee were in danger during this time.[8]

The opinion below attempted to distinguish the holdings in *Watson* and *Hay* on the basis that a misdemeanor complaint, unlike a sealed indictment, is technically available to the public. (*Serna v. Superior Court, supra* at 261; App., *infra*, A-29.) The California Supreme Court was able to attach significance to this distinction, however, only by engaging in the pure speculation, unsupported by any evidence in the record, that a defendant's life could possibly be affected by the existence of a criminal complaint of which the defendant is unaware. The court below surmised that there was

> a danger that a pending misdemeanor complaint of which the defendant is unaware may cause disruption of his life by affecting his credit rating, job

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[8]At least one other circuit had earlier reached a contrary conclusion without any discussion or analysis of the issue. (*United States v. Washington*, 504 F.2d 346, 347, 348 (8th Cir. 1974).)

> applications, admission to schools and other activities in which background checks are routine. (*Id.* at 261; App., *infra*, A-29.)

The source of this knowledge that a pending complaint could be revealed by a routine background check was not disclosed. To petitioner's knowledge, such information is not routinely available to credit rating services or employers and could be discovered only through a rigorous search of the records of every municipal court in the state.[9] As has been recognized regarding records of criminal convictions which are also "public documents,"

> From a practical standpoint, however, the likelihood that the records could be located by anyone who did not already have some knowledge of the arrests and their location is extremely remote. Thus, those convicted persons enjoy a limited *de facto* protection against indiscriminate exploitation of the record. (*Craig v. Municipal Court*, 100 Cal.App.3d 69, 78-79 (1979).)

Additionally, it seems fanciful to suggest that a defendant could be denied a job or turned away from a school based on such information without learning that he was wanted by the police.

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[9]The chances of success in such a search would be minimal in that there are 85 municipal courts and 84 justice courts in California which together accepted over one and a half million new misdemeanor cases for filing during the 1983-84 fiscal year. (Judicial Council of California 1985 Annual Report p. 134.)

2. THE OPINION BELOW WRONGLY HOLDS THAT ACTUAL PREJUDICE MUST BE PRESUMED IF THE DELAY EXCEEDS THE STATUTE OF LIMITATIONS PERIOD AND IS THUS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *BARKER V. WINGO*.

The opinion below fails to follow the decision in *Barker v. Wingo*, 407 U.S. 514 (1972), in two important respects. First, the California Supreme Court used a statute of limitations period set by the state to define the length of delay sufficient to trigger a full Sixth Amendment analysis. (*Serna v. Superior Court, supra*, at 253, as modified at 702a; App., *infra*, A-15, A-55.) The opinion is thus in direct conflict with the clear holding in *Barker* that the threshold determination that the delay is "presumptively prejudicial" and thus warrants a full hearing must be made on a case by case basis. (*Barker v. Wingo, supra*, at 530-531.) Second, the court below confused the term "presumptively prejudicial" used to describe the length of delay sufficient to warrant a full hearing with the separate issue of whether actual prejudice resulted and mistakenly ruled that if the delay exceeds one year it must be presumed that the defendant suffered actual prejudice. (*Serna v. Superior Court, supra*, at 252, 254, as modified at 702b; App., *infra*, A-14, A-17, A-56.) The procedure established in *Barker v. Wingo*, which requires a court to base its decision on the particular facts of each case, is inconsistent with the use of such presumptions.

In *Barker v. Wingo, supra*, this Court rejected the adoption of a rigid or inflexible approach in determining the effect of a delay on the defendant's right to a speedy trial and instead held that the trial court must "engage in a difficult and sensitive balancing process" to determine whether the defendant's Sixth Amendment right has been violated. (*Id.* at 522, 529, 533.) The opinion identified

four factors which must be considered: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." (*Id.* at 530.) The first factor, length of delay, was described as "a triggering mechanism." (*Id.; United States v. Loud Hawk, supra.*) This Court stated that "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." (*Barker v. Wingo, supra,* at 530.)

Two things were made emphatically clear in *Barker* concerning this "triggering mechanism." First, the length of delay sufficient to trigger the full balancing process could not be fixed but must vary from case to case. The opinion specifically stated

> because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. (*Id.* at 530-531.)[10]

Second, it was clear that although this Court used the phrase "presumptively prejudicial" in defining the length of delay sufficient to trigger an analysis of the three remaining factors, actual prejudice to the rights of the defendant was *not* to be presumed. This can be seen from the fact that prejudice is separately listed as one of the four factors to be considered. Nothing in the opinion suggests that actual prejudice should be presumed under any circumstances. Although a court must initially determine whether the length of delay is significant enough to justify an examination of the remaining three factors, all

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[10]This echoed an earlier statement in the opinion made in the course of rejecting the adoption of any rigid or inflexible approach; "We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." (*Id.* at 523.)

factors including actual prejudice must be carefully weighed before a dismissal can be ordered for the denial of a speedy trial. In *Barker* itself, for example, this Court found that the delay of over five years "was extraordinary" and easily sufficient to trigger a full inquiry. Actual prejudice, however, was not presumed. Instead, upon reviewing the evidence introduced in the trial court this Court concluded that actual prejudice to Barker "was minimal." (*Id.* at 534; see also *United States v. Loud Hawk, supra.*)

Presuming that a defendant suffered actual prejudice would be inconsistent with the reality acknowledged by this Court that the lack of a speedy trial "may work to the accused's advantage. Delay is not an uncommon defense tactic." (*Barker v. Wingo, supra,* at 521.) Additionally, no purpose would be served by resorting to the fiction of such presumptions. There is no requirement that prejudice be shown before a court can conclude that the right to a speedy trial has been violated. (*Id.* at 533; *Moore v. Arizona,* 414 U.S. 25, 26 (1973).) Rather than rely on any legal fiction, the decision in *Barker v. Wingo* commands that the trial court consider whether and to what extent each of the relevant factors is actually present and then "engage in a difficult and sensitive balancing process" based on the facts of each case.

The opinion by the California Supreme Court ignores the clear ruling of *Barker v. Wingo* by establishing a fixed standard for determining the length of delay sufficient to trigger further inquiry. The court below compounded its error by selecting the statute of limitations period set by the state legislature, and thus subject to change and variations from state to state, to define the length of delay which is "presumptively prejudicial" under the Constitu-

tion.[11] (*Serna v. Superior Court, supra,* at 253, as modified at 40 Cal.3d 702a; App., *infra,* A-15, A-56.) By thus establishing an inflexible standard for determining when delay is "presumptively prejudicial," the opinion below directly conflicts with the clear ruling in *Barker* that such determinations must be made on a case by case basis.[12]

Equally wrong is the conclusion by the court below that if the delay exceeds one year it must be presumed that some actual prejudice to the defendant resulted. The court below agreed with respondent's contention that if the delay is found to be "presumptively prejudicial," "the trial court must assume some inherent prejudice . . . ." (*Id.* at 252; App., *infra,* A-14.) The opinion below actually deletes from the balancing process the fourth factor identified by this Court in *Barker v. Wingo;* actual prejudice to the defendant. It states in language which completely confuses the clear balancing process described in *Barker v. Wingo:*

> Therefore, although there may be cases in which a defendant is able to demonstrate actual prejudice from delays of shorter duration, *he need not do so when the delay exceeds one year.* Delays of that

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[11]Such use of the statute of limitations period was rejected in *Gray v. King,* 724 F.2d 1199, 1202 n. 4 (5th Cir. 1984).

[12]The California court used the one-year statute of limitations applicable to most misdemeanors despite the fact that the crime charged in the instant case, embezzlement, and all other "wobblers" carry a three-year limitations period. (California Penal Code section 801.) Since the stated reason for using the statute of limitations as a touchstone is that "Statutes of limitation reflect a legislative construction of the speedy trial guarantee," the fact that the Legislature had determined that the statute of limitations for the crime in the instant case is three years would compel the conclusion that only a three-year delay should be considered "presumptively prejudicial." (*Serna v. Superior Court, supra,* at 254, 702a; App., *infra,* A-16, A-17, A-56.)

> magnitude are presumptively prejudicial. (*Id.* at 254 as modified at 702b; App., *infra,* A-17, A-56, emphasis added.)

The above-quoted language thus wrongly states that if the delay exceeds one year, the fourth factor of prejudice should not be considered but should be presumed to exist.

The opinion below conflicts with the decisions from the vast majority of the circuits of the United States Court of Appeals which hold that even where a delay is "presumptively prejudicial" no actual prejudice to the defendant is presumed. In *Look v. Amaral,* 725 F.2d 4 (1st Cir. 1984), for example, the prosecution conceded that a delay of nearly four years "went well beyond any threshold of 'presumptive prejudice' needed to trigger the balancing." (*Id.* at 6.) Nevertheless, when the analysis turned to the fourth factor of the *Barker v. Wingo* balancing test, the court held that "the particular circumstances of each case must be examined to see if any actual prejudice resulted." (*Id.* at 7.) Upon such an examination, the court found that "little prejudice" had resulted and that any such prejudice was "trivial" and denied the motion to dismiss. (*Id.* at 7-8.) Other cases in which the threshold requirement of "presumptively prejudicial" delay was satisfied but the court found that no actual prejudice resulted include *United States v. Crow Dog,* 532 F.2d 1182, 1192-1194 (8th Cir. 1976); *United States v. Jenkins,* 701 F.2d 850, 856-857 (10th Cir. 1983); *United States v. Frazier,* 584 F.2d 790, 792 (6th Cir. 1978); *United States v. Greene,* 578 F.2d 648, 655-656 (5th Cir. 1978); and *United States v. U.S. Treasury Bills,* 750 F.2d 900, 902 (11th Cir. 1985).

At least two circuits, however, have reached a contrary conclusion and held that actual prejudice can sometimes be presumed. In *United States v. Jackson,* 542 F.2d 403, 406 (7th Cir. 1976), the court stated "It is manifest that prejudice, always a difficult thing to ascertain, must, at

some point, be presumed . . . ." Nevertheless, the court in *Jackson* went on to consider whether the defendant suffered actual prejudice and made the apparently contradictory observation that

> The relevant inquiry for this court is "not so much with the inherent possibility of prejudice in a general sense as with whether there was specific prejudice to [defendant] in his defense." (*Id.* at 408, quoting *United States ex rel. Little v. Twomey,* 477 F.2d 767, 771 (7th Cir. 1973).)

This demonstrates the confusion sometimes engendered by the facial similarity of the term "presumptively prejudicial" used to describe the threshold requirement of the first factor of the *Barker v. Wingo* balancing test and the term "prejudice" which constitutes the fourth factor of the test.

The Ninth Circuit has also flirted with this confusion. In *United States v. Loud Hawk,* 741 F.2d 1184 (9th Cir. 1984) overruled in ____ U.S. ____ (January 21, 1986), the court adopted the above-quoted language from the Seventh Circuit concerning presumed prejudice. (*Id.* at 1193.) Only a few months earlier, however, the Ninth Circuit had apparently rejected such a presumption of actual prejudice. (*United States v. Guerrero,* 756 F.2d 1342, 1350 (9th Cir. 1984).)

The use of presumptions of any kind is inconsistent with the approach adopted in *Barker v. Wingo* which requires that the peculiar facts of each case be carefully considered to determine whether a speedy trial was denied. This Court should clarify this issue and thus resolve the conflict between the opinion below and the decisions of the majority of the circuits of the United States Court of Appeals as well as the conflict among the circuit courts themselves.

CONCLUSION

The opinion below establishes a disturbing precedent and constitutes a substantial departure from the approach used by this Court to determine Sixth Amendment speedy trial issues. Yet the seeds of some of the California Supreme Court's erroneous holdings were sown by somewhat ambiguous language contained in this Court's decisions in *United States v. Marion* and *Barker v. Wingo*. These ambiguities have generated similar confusion in lower federal courts and other state courts.

Accordingly, this Court should accept the instant case in order to resolve four important questions: 1. Does the Sixth Amendment right to a speedy trial apply when the defendant has not been arrested, is unaware of the charges, and is not available for prosecution? 2. Does the filing of a complaint and the issuance of an arrest warrant invoke the protection of the Speedy Trial Clause in misdemeanor cases? 3. Can the statute of limitations period be used to define the length of delay sufficient to meet the threshold requirement described in *Barker v. Wingo*? and 4. In conducting the balancing test described in *Barker v. Wingo*, should it be presumed that the defendant actually suffered prejudice?

DATED: February 13, 1986

Respectfully submitted,

JAMES K. HAHN,
Los Angeles City Attorney

By GREGORY EDWIN WOLFF,
Deputy City Attorney
Attorney for Petitioner,
People of the State of California

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 13, 1986, I served the within Petition for Writ of Certiorari in re: "People of the State of California v. Joaquin Mario Serna" in the United States Supreme Court, October Term 1985, No. ..... and Appendix thereto;

on the Attorney in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on February 13, 1986, at Los Angeles, California

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85-1365

Supreme Court, U.S.
FILED
FEB 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

JOAQUIN MARIO SERNA,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

Appendix
PETITION FOR WRIT OF CERTIORARI

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65 pp

APPENDIX

TABLE OF CONTENTS

	Page
Opinion of the California Supreme Court in *Serna v. Superior Court,* 40 Cal.3d 239 (1985)	A-1
Modification of Opinion, *Serna v. Superior Court,* 40 Cal.3d 702a (1985)	A-54
Order of the California Court of Appeal, Second Appellate District denying petition for writ of mandate	A-58
Minutes of the Superior Court of California denying petition for writ of mandate	A-59
Order of the California Supreme Court denying rehearing	A-61
Peremptory writ of mandate issued by California Supreme Court	A-62

APPENDIX

[40 Cal.3d 239]

[L.A. No. 31856. Oct. 24, 1985.]

[As modified Nov. 4, 1985.]

JOAQUIN MARIO SERNA, Petitioner, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
THE PEOPLE, Real Party in Interest.

Counsel

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No appearance for Respondent.

Ira Reiner, City Attorney, Jack L. Brown and Greg Wolff, Deputy City Attorneys, for Real Party in Interest.

[40 Cal.3d 245]

OPINION

GRODIN, J. — Petitioner, a defendant in a misdemeanor prosecution pending in the Municipal Court for the Los Angeles Judicial District, sought dismissal in that court on grounds that a more than four-year delay between the filing of the complaint and his arrest denied both his state and federal constitutional rights to a speedy trial. When the court denied his motion to dismiss, he sought a writ of mandate in the superior court to compel the municipal court to grant the motion. When the superior court denied his petition for writ of mandate, he sought further review in this court pursuant to Code of Civil Procedure section 904.1, subdivision (a). We granted an alternative writ to review two novel and

important questions of statewide application thus presented.

The prinicpal question concerns the time at which an accused misdemeanant's right to a speedy trial under the Sixth Amendment to the United States Constitution attaches. As we shall explain, opinions of the United States Supreme Court state, without qualification as to the level of offense charged, that the right attaches with the filing of the accusatory pleading or arrest, whichever is first. In accordance with the language and reasoning of these opinions, and with holdings by other courts, we shall conclude that when an offense is charged as a misdemeanor it is the filing of the complaint (or earlier arrest) which triggers the defendant's Sixth Amendment right to a speedy trial.

The second question of significance concerns the appropriate standard for finding an abuse of discretion in a superior court's denial of a petition for writ of mandate or prohibition filed pursuant to Code of Civil Procedure section 904.1, subdivision (a).

Before reaching either of these questions, it will be necessary to summarize the record and explain why the superior court was justified in rejecting petitioner's state constitutional speedy trial claim.

I

(1) Although this matter is before the court on a petition for writ of mandate, in other contexts an original proceeding in which evidence may be taken and disputed factual allegations resolved by a judge or jury in appropriate circumstances (Code Civ. Proc., § 1090), the sole purpose of a petition filed in an appellate court pursuant to Code of Civil Procedure

section 904.1, subdivision (a),[1] is to afford appellate review of a superior court action granting or denying a petition for writ of mandate related to a pending municipal court action.[2] The party seeking review of the superior court action must therefore provide the reviewing court with a record adequate to permit such review. (*Sherwood* v. *Superior Court* (1979) 24 Cal.3d 183, 186 [154 Cal.Rptr. 917, 593 P.2d 862].) Because the question to be decided is whether the superior court abused its discretion or exceeded its jurisdiction in granting or denying the petition filed in that court, the review authorized by

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[1]Section 904.1: "An appeal may be taken from a superior court in the following cases: [¶] (a) From a judgment, except ... (4) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or a justice court or the judge or judges thereof which relates to a matter pending in the municipal or justice court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition upon petition for an extraordinary writ."

[2]Prior to the amendment of Code of Civil Procedure section 904.1, which became effective on January 1, 1983 (Stats. 1982, ch. 1198, § 63.2, p. 4323), an appeal could be taken to the Court of Appeal from a superior court judgment granting or denying any petition for writ of mandate or prohibition. If mandate or prohibition was sought in a Court of Appeal to review an order made in a superior court proceeding, however, there could be no such appeal since review of the Court of Appeal action was available only on petition for hearing to this court. (Cal. Rules of Court, rule 28.)

The apparent purpose of the amendment was to bring review of municipal court interlocutory orders into conformity with the practice governing review of superior court orders. (*Andrus* v. *Municipal Court* (1983) 143 Cal.App.3d 1041, 1047 [192 Cal.Rptr. 341]; see also *Overby* v. *Municipal Court* (1981) 121 Cal.App.3d 377, 380 [175 Cal.Rptr. 352]; *Burrus* v. *Municipal Court* (1973) 36 Cal.App.3d 233 [111 Cal.Rptr. 539].)

section 904.1 is limited to the record made in the superior court. We shall not, therefore, consider allegations made in this petition, return, and traverse, or exhibits thereto, which were not before the superior court whose ruling is to be reviewed.[3]

Petitioner, Joaquin Mario Serna, was charged by a misdemeanor complaint filed in the municipal court on September 29, 1978,[4] with violation

[40 Cal.3d 247]

of Penal Code section 508,[5] embezzlement. The complaint alleged that the offense was committed on or about September 8 or September 9, 1978. Police preliminary

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[3]The single exception is a police report submitted by the People as an exhibit to their return. Petitioner notes that this document was before the municipal court and does not object to consideration of the report by this court. The contents of the report reveal the factual basis for the pending criminal charge, and, as will be shown, are relevant to disposition of petitioner's claim that the showing of prejudice he made in the municipal court was sufficient to shift the burden to the People to justify the delay of which he complains.

Our conclusions that other matters that were not before the superior court should not and will not be considered renders moot petitioner's motion to strike the People's return or traverse allegations made therein.

[4]The date on which the complaint was filed is among the matters the People dispute in the return filed in this court. They allege that it was not filed until October 5, 1978. The discrepancy is irrelevant to any issue in this case, but we note that the forum in which such factual disputes must be resolved is the municipal court since the superior court review on petition for extraordinary writ, like appellate court review of the superior court ruling, must be on the record made below.

[5]All future references herein to statutory provisions are to the Penal Code unless otherwise indicated.

and followup investigation reports stated that the offense occurred when petitioner failed to deposit in the station safe receipts for gasoline sold during his shift as an attendant in a service station. The owner of the business was able to determine from the records of gallonage sold during the shifts preceding and following the shift worked by petitioner that $955 had been taken in, but not deposited. Petitioner had borrowed his mother's car on September 7 and had not been seen since he completed his shift at the gasoline service station at 6 a.m. on September 9.

The reports stated that petitioner had relieved the attendant whose shift preceded his and she had read the gasoline pump meters with him at that time. The attendant who relieved petitioner did not read the meters with him because he was too busy. The safe contained recorded money drops by those two attendants, but none by petitioner.

Another notation in the reports indicated that petitioner was a prior employee who was working in his father's shift when the money was taken.

Petitioner was arrested on February 16, 1983, and promptly moved to dismiss for lack of speedy prosecution. His motion was accompanied by a declaration in which he stated that he had no knowledge of the charge prior to the date of his arrest; that he had resided with his grandmother in Los Angeles on September 8, 1978, and continued to reside with her at the same address until he

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Section 508 reads: "Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement."

moved to Montebello in December 1978. He left a forwarding address with the United States Post Office. The Montebello address had been his permanent address since that time, mail from the prior address was forwarded to him there, and his father and grandmother who lived with him at the Montebello address had known his whereabouts at all times. Petitioner also alleged that he had no independent recollection of his activities on September 8, 1978, and that persons existed who might be witnesses in his behalf but he was unaware of their names or current whereabouts. Finally, the declaration asserted that petitioner had been available for service of process at all times, had done nothing to avoid service, and had in no way caused the delay in prosecution of which he complained.

The People's opposition to the motion did not dispute the factual allegations of the motion or supporting declaration, but noted that the police report

[40 Cal.3d 248]

indicated that petitioner had failed to report to work again after the end of the shift at which he had absconded with the money and was believed at that time to be en route to his grandmother's home in Florida. No evidence was taken at the hearing in the municipal court. The court denied the motion, ruling that the showing of prejudice was inadequate because the declaration lacked specificity with regard to the names of witnesses who had been but were no longer available. In the view of the judge the defendant was required to demonstrate at least who the witnesses were, why they would be witnesses, and why they were unavailable at the time of the trial. The judge noted that employment records were available that might

have enabled petitioner to discover the names of persons who had worked at the station.

Although petitioner's counsel called the attention of the court to petitioner's reliance on both state and federal constitutional speedy trial guarantees, the court stated that denial of the motion was based on *People* v. *Allen* (1979) 96 Cal.App.3d 268 [158 Cal.Rptr. 54], and *Overby* v. *Municipal Court, supra,* 121 Cal.App.3d 377, impliedly concluding that the burden of demonstrating prejudice existed under both.

II

California Constitution

(2) "The defendant in a criminal cause has the right to a speedy public trial . . . ." (Cal. Const., art. I, § 15.) In a misdemeanor prosecution that right attaches under the California Constitution when a criminal complaint is filed. (*Scherling* v. *Superior Court* (1978) 22 Cal.3d 493, 504 [149 Cal.Rptr. 597, 585 P.2d 219]; *People* v. *Bradford* (1976) 17 Cal.3d 8, 18 [130 Cal.Rptr. 129, 549 P.2d 1225]; *Jones* v. *Superior Court* (1970) 3 Cal.3d 734, 739 [91 Cal.Rptr. 578, 478 P.2d 10]; *Harris* v. *Municipal Court* (1930) 209 Cal. 55, 62 [285 P. 699]; *Rost* v. *Municipal Court* (1960) 184 Cal.App.2d 507 [7 Cal.Rptr. 869].)[6] Inasmuch as this petitioner challenged only prearrest delay, not violation of statutory time limits adopted

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[6]When *Jones* was decided article I, section 13, provided: "In criminal prosecutions in any court whatever, the party shall have the right to a speedy and public trial . . . ." Present section 15 was adopted and former section 13, repealed in the 1974 General Election in Proposition 7. The new section simplifies the language guaranteeing a speedy trial, but no intent to change the substance of prior interpretation of the right is reflected in the ballot title, legislative

as legislative implementation of the state and federal constitutional speedy trial rights, the question to be decided by the trial court was whether the delay was shown to be unreasonable. Delays in arrest that are necessary for law enforcement purposes, i.e., those occasioned by inability to locate the accused or witnesses, or to conduct further investigation and gather evidence, do not violate the right to speedy trial unless the prosecution is delayed unreasonably. (*Jones* v. *Superior Court, supra,* 3 Cal.3d 734, 740.) To determine if the delay is unreasonable and the right to speedy trial violated, "the prejudicial effect of the delay on [the accused] must be weighed against any justification for the delay." (*Ibid.*)

(3) Under recent decisions of this court, the initial burden in establishing a violation of article I, section 15, is on the defendant seeking dismissal who must demonstrate prejudice attributable to the delay in arrest. (*Crockett* v. *Superior Court* (1975) 14 Cal.3d 433 [121 Cal.Rptr. 457, 535 P.2d 321].) Only after he has done so must the court determine if the delay was justified and engage in the balancing process. (*Scherling* v. *Superior Court, supra,* 22 Cal.3d 493, 505-507.)

There is much force in the observation of the Chief Justice that these and other recent decisions accepting

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analyst's explanation, or the arguments for and against the measure. (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 5, 1974) pp. 26-29.)

Jones and *Bradford* were felony prosecutions, but they make clear the rule that the right to a speedy trial attaches under the California Constitution when the person becomes an "accused," which occurs either when formal charges are filed or the person is subjected to the restraint of arrest. A misdemeanor complaint is a formal accusation. (§§ 691, subd. 4, 949.)

this interpretation and application of article I, section 15, appear to have departed from the assumption that the right to speedy trial guaranteed by article I, section 15, is coextensive with that of the Sixth Amendment. Nonetheless, the *Crockett* decision postdates *Barker* v. *Wingo* (1972) 407 U.S. 514 [33 L.Ed.2d 101, 92 S.Ct. 2182], in which the Supreme Court held that the Sixth Amendment requires that the balancing process must be undertaken in any case in which a postaccusation delay in prosecution has become presumptively prejudicial. This court was aware of that interpretation of the demands of the Sixth Amendment when *Crockett* was decided. (*Crockett* v. *Superior Court, supra,* 14 Cal.3d 433, 440, fn. 8.) We nonetheless held that the initial burden of showing prejudice is on the accused under article I, section 13, and did not question that rule when we subsequently imposed the same burden on an accused seeking relief on due process grounds for precomplaint delays. "[R]egardless of whether defendant's claim is based on a due process analysis or a right to a speedy trial not defined by statute, the test is the same, i.e., any prejudice to the defendant resulting from the delay must be weighed against justification for the delay." (*Scherling* v. *Superior Court, supra,* 22 Cal.3d 493, 505.)

The parties have not challenged this interpretation of the speedy trial right guaranteed by article I, section 13, in this case. We have no occasion therefore to consider whether *Crockett* and the several other opinions in which this rule has been stated were correctly decided. The question was neither

briefed nor argued. Our analysis assumes the applicability of the *Crockett-Scherling* prejudice requirement to the disposition of this case.

Although a lengthy delay, such as that which occurred here, may permit an inference of prejudice since memories fade and witnesses disappear, this is not invariably so. We look therefore to determine whether the accused has demonstrated actual prejudice from a prearrest delay. Petitioner here undertook to meet his burden by urging only "inherent" prejudice in the four-and-one-half-year delay, and by his declaration in which he stated: "I have no independent recollection of my activities on September 8, 1978 . . . [P]ersons exist who might be witnesses in my behalf, . . . at this time I am unaware of the full names or current whereabouts of these people." The trial court judge concluded that in the circumstances of this case this conclusory assertion of inability to recall the events of September 8 or to recall the names of witnesses was insufficient to permit a finding of prejudice. As a result the People were not called upon to justify the delay.

We agree that petitioner's declaration was insufficient to support a finding of prejudice. The declaration reflected no effort whatsoever by petitioner to refresh recollection and omitted any reference to the incident underlying the charge as described in the police reports. The reports recite the facts on which the charge was based and set forth the names of potential witnesses. If petitioner is the suspect described in the reports a court could properly conclude that the minimal effort of reading the reports in an attempt to refresh his memory would not be an unreasonable burden. If he is not the suspect, the court could expect at least an assertion that he had no

recall of, or had not been employed at, the gasoline station at which the embezzlement allegedly occurred.

We cannot, and do not, suggest that a judge may not believe a defendant's declaration or testimony that he has no recall of events occurring many months earlier. The court need not do so, however, and even if the assertion is believed, the court need not accept a conclusory statement that the lack of recall demonstrates prejudice where no effort has been made to ascertain the basis for the charge. Lack of recall may establish prejudice, but only on a showing that the memory loss persists after reasonable attempts to refresh recollection. "The showing of actual prejudice which the law requires must be supported by particular facts and not . . . by bare conclusionary statements." (*Crockett* v. *Superior Court, supra,* 14 Cal.3d 433, 442.)

To the extent that the denial of the motion to dismiss was based on a conclusion that petitioner had not demonstrated a cognizable violation of the right to speedy trial guaranteed by article I, section 15, of the California

[40 Cal.3d 251]

Constitution, we find no error. We therefore conclude that the superior court did not abuse its discretion in denying the petition for writ of mandate and prohibition on this ground.

III

Constitution of the United States

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." (U.S. Const., 6th Amend.)

Because the right to a speedy trial is personal and is waived if not properly asserted by a defendant, it has been said that it is not a "favored" right. (*People* v. *Wilson* (1963) 60 Cal.2d 139, 148 [32 Cal.Rptr. 44, 383 P.2d 452].) Nonetheless, when asserted it is as "fundamental as any of the rights secured by the Sixth Amendment." (*Klopfer* v. *North Carolina* (1967) 386 U.S. 213, 223 [18 L.Ed.2d 1, 8, 87 S.Ct. 988]; *Barker* v. *Wingo, supra,* 407 U.S. 514, 515 [33 L.Ed.2d 101, 108].) (4) It protects a criminal defendant against oppressive pretrial incarceration, anxiety, concern, and disruption of his everyday life. (*Barker* v. *Wingo, supra,* 407 U.S. 514, 532 [33 L.Ed.2d 101, 118].) Delays leading to the initiation of formal proceedings may also prejudice the defendant in his ability to defend, for the same reason as delays thereafter — death or disappearance of witnesses, fading memories, and destruction of evidence — but those delays do not violate the Sixth Amendment right to speedy trial, which attaches only upon the filing of an accusatory pleading. Formal charges must be pending. (*United States* v. *MacDonald* (1982) 456 U.S. 1, 7 [71 L.Ed.2d 696, 703, 102 S.Ct. 1497].) Prearrest delay may give rise to a due process claim, but only delay following formal accusation or delay subsequent to arrest are considered in evaluating a claim under the Sixth Amendment speedy trial clause. (*Ibid.*)

In *United States* v. *Marion* (1971) 404 U.S. 307 [30 L.Ed.2d 468, 92 S.Ct. 455], the United States Supreme Court explained the purposes of the speedy trial guarantee and, in so doing, referred to filing of an information or indictment as the triggering events, stating: "Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible

prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. These considerations were sub-

[40 Cal.3d 252]

stantial underpinnings for the decision in *Klopfer* v. *North Carolina, supra*; see also *Smith* v. *Hooey*, 393 U.S. 374, 377-378 (1969). So viewed, it is readily understandable that *it is either a formal indictment or information* or else the actual *restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.*" (404 U.S. at p. 320 [30 L.Ed.2d at pp. 478-479], italics added.)

(5) When a delay in bringing a defendant to trial after the filing of formal charges has become presumptively prejudicial, and the defendant seeks dismissal of the charges on grounds that his Sixth Amendment right to a speedy trial has been violated, the court must balance the relevant factors — the length of the delay, the reason for the delay, the defendant's assertion of the right, and the prejudice to the defendant — in assessing whether the delay has deprived the defendant of that right. (*Barker* v. *Wingo, supra,* 407 U.S. 514, 530 [33 L.Ed.2d 101, 117].) The defendant need not establish actual prejudice as a prerequisite to a hearing at which evidence relevant to this balancing process is heard. (*Moore* v. *Arizona* (1973) 414 U.S. 25, 26 [38 L.Ed.2d 183, 185-186].)

Therefore, if a misdemeanor complaint also triggers Sixth Amendment protections a defendant seeking dismissal on grounds that his right to speedy trial has been violated need not demonstrate actual prejudice as a prerequisite to judicial consideration of his claim.

(6a) Petitioner here contends that the four-and-one-half-year delay in arresting him following the filing of the misdemeanor complaint is presumptively prejudicial and thus the trial court must assume some inherent prejudice and engage in this weighing process, putting the People to the burden of justifying the delay by showing that legitimate law enforcement concerns caused or contributed to the delay.

We agree that the delay here was presumptively prejudicial. The length of the delay between the filing of the complaint and the arrest of defendant far exceeded the one-year limitation period applicable to misdemeanors. Had there been no complaint on file the prosecution would have been statutorily barred. **(7a)** Statutes of limitation reflect a legislative construction of the speedy trial guarantee. (*Barker* v. *Municipal Court* (1966) 64 Cal.2d 806, 812 [51 Cal.Rptr. 921, 415 P.2d 809].) A court may appropriately conclude that delays between the filing of a complaint and the arrest of a defendant which exceed the period of limitation applicable to the charged offense are unreasonable and thus presumptively prejudicial within the contemplation of the speedy trial guarantee since these statutes implement and serve the objectives of the constitutional provision. "[T]he concept of a

[40 Cal.3d 253]

period of limitation developed in recognition of the ever increasing difficulty faced by both the government and a

criminal defendant in obtaining reliable evidence (or any evidence at all) as time passes following the commission of a crime.... [¶] Other policy considerations which underlie the concept of a period of limitation vary in purpose. The possibility of self-reformation by the criminal offender may lessen the need for society to impose corrective sanctions and society's impulse for retribution may correspondingly diminish as time passes.... Finally, adoption of a period of limitation represents a legislative recognition that for all but the most serious of offenses (such as murder or kidnaping) a never-ending threat of prosecution is more detrimental to the functioning of a civilized society than it is beneficial." (*People* v. *Zamora* (1976) 18 Cal.3d 538, 546-547 [134 Cal.Rptr. 784, 557 P.2d 75].) It would be anomalous, in light of the congruent objectives of the speedy trial guarantee and the legislatively adopted periods of limitation which implement that guarantee, if the mere filing of a misdemeanor complaint without further action by the state for a period in excess of the applicable statute of limitation were not presumed to be a violation of the right to speedy trial, and the People compelled to justify the delay.

(6b) Our conclusion that a delay between the filing of a misdemeanor complaint and the arrest and prosecution of a defendant which exceeds the statutory period of limitation is unreasonable and presumptively prejudicial is virtually compelled by prior decisions of this court. In *Harris* v. *Municipal Court* (1930) 209 Cal. 55 [285 P. 699], we noted that section 1382, which required dismissal of a felony information if the defendant had not been brought to trial within 60 days unless good cause for the delay was shown was a legislative determination that a trial after that unjustified delay was not a speedy trial, and we extended to misdemeanants the same reasoning even in the absence of a statutory requirement of dismis-

sal. In that case, in which the delay between the filing of the complaint and the arrest of the defendant was 18 months, we stated: "It would be most unreasonable to hold that a delay of eighteen months in the trial of the action was not in violation of the constitutional right to a speedy trial when . . . the petitioner was at all times available for the service of process and that the delay was not at all traceable to him." [209 Cal. at pp. 62-63.) In a companion misdemeanor case, *Gutterman* v. *Municipal Court* (1930) 209 Cal. 65 [285 P. 703], again the complaint had been filed some 18 months prior to the arrest of the defendant, and again this court ordered dismissal because the People failed to show good cause for the delay. In each case the delay was considered unreasonable and thus prejudice was presumed with dismissal being constitutionally compelled in the absence of a demonstration of good cause for the delay.

(7b) The measuring period utilized by the court in *Harris* and *Gutterman* was the 60-day period mandated by the Legislature for felony prosecutions.

[40 Cal.3d 254]

The Legislature has since amended section 1382, which now reflects a legislative determination that dismissal is not required unless there is a delay in excess of 45 days between arraignment and trial or 30 days if the defendant is in custody. Although this manifests a legislative conclusion that the delay between the filing of the complaint and arraignment should not be considered in determining if a delay in bringing a misdemeanor defendant to trial is unreasonable, the statute of limitation remains as a touchstone for measuring the reasonableness of a delay between complaint and arrest. If a delay of one year in charging a misdemeanor defendant is so unreasonable

that prosecution is statutorily barred, it follows that a delay of similar duration must be considered unreasonable and presumptively prejudicial within the contemplation of the Sixth Amendment when, although a complaint has been filed, the defendant is not arrested and arraigned on the complaint for that period.

Therefore, although there may be cases in which a defendant is able to demonstrate actual prejudice from delays of shorter duration, he need not do so when the delay exceeds the period of limitation established by the Legislature. Delays of that magnitude are presumptively prejudicial.

(8) The People do not contend that the delay which occurred in this case was not presumptively prejudicial. They argue instead that the delay here is not subject to consideration as a Sixth Amendment violation at all. In support of this argument they suggest that a misdemeanor complaint is not the kind of accusatory pleading which triggers Sixth Amendment rights upon filing, basing this claim on the language used by the Supreme Court in *Marion.* We therefore address the crucial question of when the right to speedy trial attaches in misdemeanor cases.

The People do not dispute the proposition that a misdemeanor complaint is a formal accusation. Indeed, in a misdemeanor prosecution, it is the only formal accusatory pleading filed with the court. Without it the trial jurisdiction of the court has not been invoked. (*City of San Diego v. Municipal Court* (1980) 102 Cal.App.3d 775, 778 [162 Cal.Rptr. 420].) The People argue, however, that because *Marion* and other decisions of the United States Supreme Court in which that court has held that the right to speedy trial attaches upon the filing of a formal accusation or charge have all been cases in which an indictment

or information was used the question of when the right attaches in misdemeanor prosecutions is not settled. In addition, they rely on a literal application of the quoted language in *Marion* stating that "it is either a *formal indictment* or *information* or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth

[40 Cal.3d 255]

Amendment." (*United States* v. *Marion, supra,* 404 U.S. 307, 320 [30 L.Ed.2d 468, 479], italics added.)

We do not think the question is as unsettled as the People would have us believe, however. The Sixth Amendment guarantees the right to a speedy trial to the accused in "all criminal prosecutions." We find nothing in the opinions of the United States Supreme Court which construe and apply the Sixth Amendment speedy trial guarantee to support a conclusion that the right differs based upon definitional labels attached to criminal offenses by the Legislature. Indeed, many offenses are punishable as either felonies or misdemeanors,[7] while others have been designated misdemeanors for a first offense and felonies thereafter.[8] Some have been elevated from misdemeanor to felony status when the Legislature determined that penalties greater than those attached to misdemeanors

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[7]Petitioner is charged with such an offense. (See fn. 5.) Other offenses in this category include second degree burglary (§ 461); some assaults (§§ 241.1, 241.4); some batteries (§ 243, subds. (c) and (d)); vehicular manslaughter (§ 193, subd. (4)); and a variety of offenses involving theft or forgery (§§ 470a, 470b, 473, 474, 475, 475a, 476, 476a, 481, 484b, 484i, subd. (b), 666.)

[8]See, e.g., sections 499b, 499b.1, subdivision (b), 647a.

are appropriate. On occasion the reverse may occur.[9] And at times in the history of our state, misdemeanor penalties have exceeded some felony penalties.[10] Were we to accept the literal reading of the isolated language in *Marion* relied on by the People the speedy trial right of a minor initially charged with a felony in a petition filed pursuant to Welfare and Institutions Code section 602, but then certified for trial as an adult, would not attach until arrest, while that of an adult, charged with the same offense, would attach upon the filing of an information or indictment. We do not understand the People to be making such a claim or the Constitution to permit that result.[11]

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[9]See, e.g., section 137, subdivision (a), which was a misdemeanor when enacted in 1872, but was elevated to a felony only a year later. (Code Amend. 1873-1874, ch. 614, § 10, p. 425.)

[10]The penalty for false personation (§ 529) for example was two years in the county jail when the section was enacted in 1872, making the offense a misdemeanor by definition. That for refusing to arrest or receive a person charged with crime, applicable to peace officers (§ 142), was five years in the county jail. Many felonies were punishable by imprisonment "not exceeding five years," while others had lesser terms of imprisonment.

[11]We do not decide here, of course, whether the Sixth Amendment right to a speedy trial extends to delinquency proceedings in a juvenile court. While the United States Supreme Court appears not to have decided that question, it has been held applicable in New York (see *Matter of Anthony P.* (1980) 104 Misc.2d 1024 [430 N.Y.S.2d 479]; *Matter of Patrick G.* (1977)) 92 Misc.2d 126 [399 N.Y.S.2d 862]) and Alaska (*RDSM v. Intake Officer* (Alaska 1977) 565 P.2d 855), and was assumed to apply in *State v. Boatman* (Fla. 1976) 329 So.2d 309. That assumption has been made by one leading authority in this state. (1 Cal. Juvenile Court Practice (Cont.Ed.Bar 1981) § 6.33, p. 196.)

In determining the applicability of other constitutional rights, the Supreme Court has emphasized that the nature of the proceeding and its consequences

[40 Cal.3d 256]

determine the applicability of the protections of the Bill of Rights, not "labels of convenience." (See, e.g., *In re Gault* (1966) 387 U.S. 1, 50 [18 L.Ed.2d 527, 558, 87 S.Ct. 1428]; see also *McKeiver* v. *Pennsylvania* (1971) 403 U.S. 528, 541 [29 L.Ed.2d 647, 658, 91 S.Ct. 1976]; *Matter of Anthony P., supra,* 104 Misc.2d 1024 [430 N.Y.S.2d 479, 480]. Moreover, elsewhere in *Marion* the court uses language generally applicable to any criminal proceeding, referring to the time at which "the putative defendant in some way becomes an 'accused' " (404 U.S. at p. 313 [30 L.Ed.2d at p. 474]); to "indictment, information, or other formal charge" (*id.,* at p. 321 [30 L.Ed.2d at p. 479]); and to whether the defendant had been "arrested, charged, or otherwise subjected to formal restraint prior to indictment" (*id.,* at p. 325 [30 L.Ed.2d at p. 481]), as events triggering the right to speedy trial.

The People suggest no basis upon which to explain or support a construction of the right to speedy trial that extends to misdeameanor defendants different rights than it accords felony defendants.[12] Nor do they offer any basis for distinguishing between those defendants charged with misdemeanors by indictment and those charged by complaint.

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[12]In attempting to develop a different rule for misdemeanors, the People do not consider whether, if this petitioner's right to a speedy trial had been presumptively violated because the offense had been charged as a felony by indictment more than four years before his arrest, it would be constitutionally permissible to avoid that conclusion by reducing the charge to a misdemeanor.

That the Sixth Amendment guarantee does apply to misdemeanants, and does so when an indictment is the accusatory pleading is beyond dispute. That was the case in *Klopfer* v. *North Carolina, supra,* 386 U.S. 213, in which the Sixth Amendment guarantee of a speedy trial was held to be applicable to the states by incorporation through the Fourteenth Amendment. The defendant in *Klopfer* had been charged with criminal trespass, a misdemeanor, by indictment. After a prompt trial at which the jury failed to reach a verdict, and two orders for continuance of the case for a term, the prosecutor was granted leave to enter a nolle prosequi which would have postponed trial indefinitely. The Supreme Court considered the same interests that it had held were protected by the Sixth Amendment in felony prosecutions. "The petitioner is not relieved of the limitations placed upon his liberty by this prosecution merely because its suspension permits him to go 'whithersoever he will.' The pendency of the indictment may subject him to public scorn and deprive him of employment and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the 'anxiety and concern accompanying public accusation,' the criminal procedure . . . clearly denies the petitioner the right to a speedy trial which we hold is

[40 Cal.3d 257]

guaranteed to him by the Sixth Amendment of the Constitution of the United States." (386 U.S. at pp. 221-222 [18 L.Ed.2d at p. 7], fn. omitted.)

Although *Klopfer* did not address the question presented here — the time at which the Sixth Amendment right to speedy trial attaches in a misdemeanor prosecution — it precludes any claim that the scope of the right

and the considerations relevant to finding a cognizable violation of the right differ in felony and misdemeanor prosecutions.

(9a) The People also seek support for their position in inapposite decisions of this court. In *People* v. *Hannon* (1977) 19 Cal.3d 588, 605 [138 Cal.Rptr. 885, 564 P.2d 1203], we concluded that the right to speedy trial did not attach under the Sixth Amendment upon the filing of a complaint. *Hannon,* however, involved a *felony* complaint, a pleading to be followed upon the arrest of the defendant by a preliminary hearing, and if probable cause was shown, by an order binding the defendant over for trial and the filing of an information. (§§ 859a, 859b, 872, 739.) A felony complaint, unlike a misdemeanor complaint, does not confer trial jurisdiction. It invokes only the authority of a magistrate, not that of a trial court. (§ 806.) The People's argument ignores the distinct function of the felony complaint as a preliminary accusation. The felony complaint functions to bring the defendant before a magistrate for an examination into whether probable cause exists to formally charge him with a felony. Only if probable cause exists may an information invoking the trial jurisdiction of the superior court be filed. In addition, the filing of a felony complaint, unlike indictment or accusation by information, does not threaten oppressive pretrial incarceration. The time constraints within which the preliminary hearing must be conducted or the complaint dismissed and the defendant released (§ 859b) ensure that the defendant is not subjected to extended anxiety or public opprobrium, and by giving the defendant immediate notice of the charge and opportunity to defend avoid prejudice to the defense. This step, preliminary to formal accusation in the court with jurisdiction over the prosecution of the charge, does not implicate the Sixth Amendment right to speedy trial if

our interpretation of *Marion* is correct. The misdemeanor complaint, by contrast, is not a preliminary accusation. It is a formal charge, an accusatory pleading giving the court jurisdiction to proceed to trial.[13]

[40 Cal.3d 258]

We are not alone in our conclusion that the right to speedy trial under the Sixth Amendment is not dependent upon the label placed on an accusatory pleading. The Sixth, Ninth, and District of Columbia Circuits have interpreted *Marion* as holding that the right attaches upon the filing of formal charges. (*United States* v. *Martin* (6th Cir. 1976) 543 F.2d 577, 579; *United States* v. *Cordova* (9th Cir. 1976) 537 F.2d 1073, 1075; *United States* v. *Jones* (D.C. Cir. 1975) 524 F.2d 834, 839, fn. 7.) Appellate courts in several states interpret *Marion* in a similar manner, referring in their decisions to "complaints" as well as other charging documents. (See, e.g., *Yarbor* v. *State* (Alaska 1976) 546 P.2d 564, 567; *People* v. *Velasquez* (Colo. 1982) 641 P.2d 943, 951; *People* v. *Nichols* (1978) 60 Ill.App.3d 919 [18 Ill.Dec. 330, 377 N.E.2d 815, 819]; *Commonwealth* v. *Conant* (1981) 12 Mass.App. 287 [423 N.E.2d 1035, 1036]; *State* v. *Brouillette* (Minn. 1979) 286

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[13]The People also seek to rely on our statement in *Scherling* v. *Superior Court, supra,* 22 Cal.3d 493, 504, that "under California as well as federal law, the right to a speedy trial clearly attaches after an arrest or the filing of an indictment or information." But *Scherling,* too, was a felony prosecution in which the defendant sought dismissal after the information was filed. We had before us neither a felony complaint nor a misdemeanor complaint. As the People note in their effort to convince us that the question of when the speedy trial right attaches in misdemeanor proceedings was not resolved by *Marion* because that case involved a felony, "an opinion is not authority for a proposition not therein considered." (*Ginns* v. *Savage* (1964) 61 Cal.2d 520, 524, fn. 2 [39 Cal.Rptr. 377, 393 P.2d 689].)

N.W.2d 702, 706; *Bauhaus* v. *State* (Okla.Crim. 1975) 532 P.2d 434, 439; *Estrada* v. *State* (Wyo. 1980) 611 P.2d 850, 852-853.) Others recognize the right as applicable upon the filing of formal charges or accusations. (See, e.g., *State* v. *Bryson* (1972) 53 Hawaii 652 [500 P.2d 1171, 1173]; *State* v. *Roddy* (R.I. 1979) 401 A.2d 23, 30, fn. 4; *Matter of Anthony P., supra,* 104 Misc.2d 1024 [430 N.Y.S.2d 479, 480]; *State* v. *Goltz* (1982) 197 Mont. 361 [642 P.2d 1079, 1081]; *State* v. *Tafoya* (1977) 91 N.M. 121 [570 P.2d 1148, 1150]; *Avants* v. *State* (1974) 257 Ark. 22 [513 S.W.2d 805, 807].)

Considering procedures which, like those in this state distinguish felony and misdemeanor complaints, the Court of Appeals of Maryland reached the same conclusion regarding the nature of the accusatory document necessary to activate the speedy trial right. In *State* v. *Gee* (1984) 298 Md. 565 [471 A.2d 712], the court reasoned: "It is obvious that the *issuance* of the warrant of arrest placed no actual restraint upon Gee's liberty. Thus, the 'arrest' requirement of the speedy trial rule was in no way satisfied by the mere issuance of the warrant. . . . [¶] [However a]s defined in the rules of the Maryland District Court, a warrant is a written order by a judicial officer. . . . There must be attached to it a copy of the charging document. . . . [¶] A defendant may be tried in the District Court upon the document consisting of the warrant and the statement of charges when the offense charged is under the jurisdiction of that court. . . . [¶] We think that the document consisting of a warrant of arrest and statement of charges on which the warrant is based (warrant-statement of charges) is a 'formal charge' in the contemplation of the speedy trial right *when a defendant is subject to be tried on that document.* In that event the criminal prosecution has truly commenced and the putative defendant has become an 'accused.' The State has

committed itself to prosecute and the adverse positions of the State and defendant have solidified. . . . A warrant-statement of charges on

[40 Cal.3d 259]

which a defendant can be tried is tantamount to an indictment or an information. Therefore, its mere issuance marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable. . . .

"On the other hand when the defendant cannot be tried under the warrant-statement of charges he is not held to answer a criminal charge on the basis of that document. Its issuance does not mark the onset of formal prosecutorial proceedings to which the Sixth Amendment guarantee is applicable, nor has the putative defendant thereby become an 'accused.' The State has not by the issuance of such a warrant-statement of charges committed itself to prosecute. Before it can proceed the grand jury must indict or the State's Attorney must file an information. Neither is obliged to do so. . . . In such circumstances the warrant-statement of charges is not the equivalent of an indictment or an information. It is not a 'formal charge' and thus, its mere issuance does not activate the speedy trial provision." (471 A.2d 712, 715-716, italics in original; accord *Favors* v. *Eyman* (9th Cir. 1972) 466 F.2d 1325.)

(10) The People argue alternatively that whether the prosecution is for a felony or a misdemeanor the right should not attach until the accused is aware of the formal charge. Until that time none of the interests sought to be protected by the Sixth Amendment is implicated. The accused is not incarcerated or otherwise restrained, his life is not disrupted by the existence of the charge, and he

is not conscious of any public obloquy, stress, or anxiety. To the extent that his ability to defend may be impaired, adquate protection is available through application of due process principles should he demonstrate prejudice. In support of this approach to speedy trial rights the People rely on what they perceive to be a shift in emphasis by the Supreme Court in its refusal to apply the Sixth Amendment in *United States* v. *MacDonald, supra*, 456 U.S. 1, 7.

"The Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." (*United States* v. *MacDonald, supra*, 456 U.S. 1, 8 [71 L.Ed.2d 696, 704].)

The People find significance in the omission from this statement of purpose of reference to "public obloquy," one of the consequences of delay mentioned by the *Marion* court.

[40 Cal.3d 260]

In *MacDonald* the court held that the time after dismissal of military charges and the defendant's indictment on civilian charges need not be considered in evaluating his speedy trial claim, stating also that "[f]ollowing dismissal of charges, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it

is upon anyone openly subject to a criminal investigation." (456 U.S. at p. 9 [71 L.Ed.2d at p. 704].)

Contrary to the People's understanding of *MacDonald*, we find in that opinion a continued emphasis on the importance of the speedy trial guarantee in protecting against disruption of a defendant's life which is the major evil flowing from the considerations enumerated by the court in *Marion*. And, as we observed above, the court made express reference to "exposure to public obloquy" as an evil to be prevented in the *MacDonald* opinion.

Nor are we persuaded by the thesis which underlies the People's argument — an assumption that no adverse consequences flow from a misdemeanor complaint of which the defendant is unaware. A misdemeanor complaint is a public document. (*Estate of Hearst* (1977) 67 Cal.App.3d 777, 782 [136 Cal.Rptr. 821].) Contrary to the assertion of the People, statutes forbidding dissemination of criminal history information which implement citizens' rights to privacy[14] do not ensure that an outstanding complaint and arrest warrant will not become public or come to light in a routine credit or employment check. An arrest warrant issued on the strength of a complaint (see § 1427) is not confidential. The Attorney General has recently expressed his view that local officials may publish in a newspaper the names of persons for whom warrrants of arrest have been issued for the purpose of obtaining public assistance in locating them. He reasons that the information that a warrant has been issued is a "public fact." (67 Ops.Cal.Atty.Gen. No. 83-906, Oct. 11, 1984.[15]

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[14]See, e.g., section 11105.

[15]The Attorney General reasons in his opinion: "In this opinion we are not concerned with the execution of the warrant of arrest. If the whereabouts of the defendant is known to the police agency which has

[40 Cal.3d 261]

In urging us to reject a literal reading of the language of *Marion* declaring that "either a formal indictment or information or . . . the actual restraints imposed by arrest and holding to answer" engage the protections of the Sixth Amendment, the People place primary reliance on *United States* v. *Watson* (2d Cir. 1979) 599 F.2d 1149, and *United States* v. *Hay* (10th Cir. 1975) 527 F.2d 990. Those decisions held that a delay between the filing of a sealed indictment and the arrest of the defendant does not implicate Sixth Amendment speedy trial rights. But even if those decisions are correct in concluding that a sealed indictment is not an accusatory pleading within the meaning of *Marion,* they do not support the People's argument that a defendant is not accused until he is arrested on a

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the warrant it is unlikely that such agency would publicly disclose the existence of the warrant for fear that the defendant would flee before it could be served. On the other hand, if the location of the defendant is unknown the police agency may elect to send copies of the warrant or abstracts thereof by telegraph, teletype or other electronic devices to other police agencies to allow other police officers to locate and apprehend the defendant. (Pen. Code, § 850.) The familiar 'all points bulletin' often reaches the general public when media attention focuses on the defendant sought through the arrest warrant . . . .

"The fact of the filing of the criminal complaint and the fact of the issuance of a warrant of arrest . . . are matters of record in the court. (Pen. Code, § 1428.) Ordinarily, court records are public records as explained in Estate of Hearst (1977) 67 Cal.App.3d 777, 782-783 . . . .

[p. 261]

". . . .

"The publication contemplated by the question presented to us is dissimilar from a tortious disclosure of old facts. The district attorney would publish or cause to be published a current public fact that a person was wanted on a criminal charge. The apprehension of such person is a matter of legitimate public concern, i.e., enforcement of child support by the location of the absent parent. . . ."

misdemeanor complaint or has notice of it. Each recognized that the Sixth Amendment right to speedy trial attaches as soon as the indictment is unsealed and made public, or when the accused has notice of it. (599 F.2d at p. 1156; 527 F.2d at p. 994.) We cannot, therefore, equate a misdemeanor complaint which is a prerequisite to issuance of a warrant to a sealed indictment, nor can we accept the People's argument that if the defendant is unaware of the complaint or warrant he will not be subject to public opprobrium or possible disruption of his life. To the contrary, the opinion of the Attorney General confirms the existence of a danger that a pending misdemeanor complaint of which the defendant is unaware may cause disruption of his life by affecting his credit rating, job applications, admission to schools and other activities in which background checks are routine.

Thus this aspect of the reasoning of the *Watson* court is inapplicable. There the decision was based in part on absence of notice to the public of the charge. "We hold that the filing of a sealed indictment does not, in the light of these purposes, trigger the speedy trial provision. Because neither the indicted defendant nor the public has notice of the charges, such an indictment does not bring about 'the major evils protected against by the speedy trial guarantee.' *Marion, supra,* 404 U.S. at 320, 92 S.Ct. at 463, namely, public obloquy and anxiety to the accused." (599 F.2d 1149, 1156, fn.5.) Similar reasoning underlies the *Hay* decision. There the court noted that the defendant had not been available for prosecution and that because the indictment had been sealed he had not been subject to restraints on his liberty or public accusation during the period between the indictment and arrest. (527 F.2d 990, 994, and fn. 4.) The persuasive effect of *Watson* and *Hay* is further undercut by the Supreme

Court s opinion in *MacDonald* where, several years after those cases had been decided the court reiterated

[40 Cal.3d 262]

the rule enunciated in *Marion* stating without qualification: "In *United States* v. *Marion,* 404 U.S. 307, 313 (1971), we held that the Speedy Trial Clause of the Sixth Amendment does not apply to the period before a defendant is indicted, arrested, *or otherwise officially accused:* [¶] 'On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been "accused" in the course of that prosecution. . . . The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him.' " (*United States* v. *MacDonald, supra,* 456 U.S. 1, 6-7 [71 L.Ed.2d 696, 702-703], italics added.)

(9b) In sum, the People do not offer a persuasive basis on which to avoid what appears to be the controlling impact of the decisions of the United States Supreme Court which hold that the right attaches upon the filing of a formal accusatory pleading. We are persuaded by the repeated reference in decisions of the United States Supreme Court to formal accusation or charge, and by the acceptance of that interpretation of *Marion* by the courts of other jurisdictions, that the Sixth Amendment right to speedy trial attaches in misdemeanor prosecutions, as it does in felonies, with the filing of the accusatory pleading, here a misdemeanor complaint, or arrest, whichever is first.[16] Therefore, since the more than four-year delay in

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[16]In *Overby* v. *Municipal Court, supra,* 121 Cal.App.3d 377, the Court of Appeal reached a contrary conclusion, reasoning that the

arresting defendant is beyond question presumptively prejudicial, the municipal court erred in failing to receive evidence on the considerations relevant to the weighing process and to resolve petitioner's motion to dismiss pursuant to the dictates of *Barker* v. *Wingo, supra,* 407 U.S. 514: by weighing the interests of the defendant and the prosecution to determine whether the right was violated in this case.

IV

Pretrial Writ Review

(11a) We next consider whether, in light of our conclusion that the municipal court erred in failing to conduct the hearing required by *Barker*

[40 Cal.3d 263]

v. *Wingo,* the superior court abused its discretion in denying the petition for writ of mandate and prohibition filed in that court.

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rules in misdemeanor cases were no different than those in felony cases, and holding on that basis that "the federal right does not attach until the individual has been arrested, charged (in the statutory 1382 sense) or otherwise subjected to formal restraint." (121 Cal.App.3d at p. 387.) The reference to section 1382 was to the requirement of subdivision 3 of that section which provides the time limits within which a misdemeanor defendant must be brought to trial after arraignment. Without explanation, citation of authority, or analysis, the court assumed that the Sixth Amendment speedy trial right attached at the same time that the statutory right did, at arraignment. Inasmuch as we find no basis in the controlling decisions of the United States Supreme Court for distinguishing felony and misdemeanor speedy trial rights in this manner, *Overby* must be disapproved to the extent that it is inconsistent with our conclusions here.

(12) In criminal as well as civil proceedings review of interlocutory rulings of trial courts by extraordinary writ generally is available only if there is no adequate remedy by appeal. (Code Civ. Proc., §§ 1086, 1103; cf. *Babb* v. *Superior Court* (1971) 3 Cal.3d 841, 851 [92 Cal.Rptr. 179, 479 P.2d 379] ["upon occasion our attention is drawn to instances of such grave nature or of such significant legal impact that we feel compelled to intervene through the issuance of an extraordinary writ"].) Although violation of the relatively short statutory time limits of section 1382 by which the Legislature has sought to implement the right to speedy trial does not implicate the interests to be protected to the same degree as does violation of the Sixth Amendment right itself, relief for statutory speedy trial violations is available pretrial. Prejudice is presumed when relief is sought on section 1382 grounds pretrial because the statute commands that the court "must order the action to be dismissed." However, when this and other statutory rights to speedy trial have been violated, a defendant who seeks relief on appeal must demonstrate actual prejudice. (*People* v. *Wilson, supra,* 60 Cal.2d 139, 153; see also *People* v. *Pompa-Ortiz* (1980) 27 Cal.3d 519, 529 [165 Cal.Rptr. 851, 612 P.2d 941].) Because the statutory time within which a defendant must be brought to trial is short, it is not unreasonable to require a defendant who does not seek or obtain pretrial relief to demonstrate actual prejudice when reversal of a judgment is sought on this ground on appeal.

These rules are not appropriate means by which to redress Sixth Amendment violations, however. When, in a proper *Barker* v. *Wingo* hearing a Sixth Amendment speedy trial violation has been established, reversal of a subsequent judgment of conviction is necessary in every case. Where prejudice to the defendant's ability to defend has been established there can be no question but that

reversal is required. And where the balance of interests establishes a violation of a defendant's speedy trial right because of the impact on his other interests — prolonged restraint, public obloquy, anxiety, stress, and disruption of everyday life — leaving him to his remedy on appeal would exacerbate the harm by prolonging the period during which he remained subject to those conditions and would offer only the Pyrrhic victory of a reversal should he ultimately be convicted.[17] Extraordinary writ review of a misdemeanor defendant's motion to dismiss made on speedy trial grounds is therefore necessary because appeal does not afford an adequate

[40 Cal.3d 264]

remedy for redress of these violations. Relief should be granted whenever the trial court record establishes a violation of the right to speedy trial guaranteed by the Sixth Amendment. The defendant will thus be accorded some redress for the violation of his interests as he will not have to undergo the strain and expense of trial; the public fisc will be spared the expense of a futile trial and consequent appeal; and an effective means by which to enforce the right to speedy trial will exist.

(11b) The writ should also issue in cases such as this in which although the defendant offered evidence establishing a presumptively prejudicial delay, and that evidence was undisputed by the People in any essential aspect, the trial court failed to put the People to its proof, i.e., it failed to require the People to offer justification adequate to demonstrate that the legitimate interests of law en-

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[17]If a misdemeanant were unable to obtain his release on bail or on his own recognizance during the pendency of the appeal, he might serve his entire term while awaiting this hollow victory.

forcement warranted the disruption of defendant's life some four and one-half years after the charged offense allegedly was committed. The superior court therefore abused its discretion in denying the petition for writ of mandate and prohibition and in failing to compel the municipal court to conduct a hearing at which the People would be called upon to justify the delay.

Let a peremptory writ of mandate issue directing the Superior Court for the County of Los Angeles to vacate its order denying the petition for writ of mandate and to issue a new and different order directing issuance of a writ of mandate to the municipal court ordering further proceedings consistent with these views.

Mosk, J., Broussard, J., and Reynoso, J., concurred.

BIRD, C. J., Concurring and Dissenting. — I join in my colleagues' analysis of the federal constitutional speedy trial right. (Maj. opn., *ante*, Part III.) However, I would not be so quick to conclude that the state constitutional guarantee offers any less protection to California citizens. (*Id.*, Part II.)

For many years, this court held that the California speedy trial right " 'reflects the letter and spirit of' the Sixth Amendment to the United States Constitution" (*People* v. *Wilson* (1963) 60 Cal.2d 139, 144, fn. 2 [32 Cal.Rptr. 44, 383 P.2d 452], quoting *Harris* v. *Municipal Court* (1930) 209 Cal. 55, 60 [285 P. 699].) When this court chose to reject the letter and spirit of the federal Constitution, it did so to hold that the state speedy trial right was *more* protective, attaching at an earlier stage of the proceedings than did the Sixth Amendment. (*People* v. *Hannon* (1977) 19 Cal.3d 588, 604-608 [138 Cal.Rptr. 885, 564 P.2d 1203]; compare *United States* v. *Marion* (1971) 404 U.S. 307 [30 L.Ed.2d 468, 92 S.Ct. 455].) Yet,

the majority now find that the state Constitution, as interpreted in *Scherling* v.

[40 Cal.3d 265]

Superior Court (1978) 22 Cal.3d 493 [149 Cal.Rptr. 597, 585 P.2d 219], places on the accused who claims a violation of his right to a speedy trial an initial burden of showing prejudice, a burden which the federal Constitution does not impose.

I agree that the language of *Scherling* and its predecessors suggests that an accused must demonstrate that his defense has been prejudiced by a delay before any inquiry need be made into the length or causes of that delay. However, I strongly doubt that this court ever consciously chose to construe the state speedy trial provision to provide less protection against governmental abuse than does the federal Constitution.

On the contrary, the *Scherling* language appears to have evolved from earlier cases in which the speedy trial right did *not* apply and in which the due process clause alone was applicable. Those cases incorporated the threshold prejudice requirement into speedy trial claims without considering whether this constituted a step backward from the development of federal law. Nor did they expressly consider whether such a requirement was logically relevant to a claimed speedy trial violation. I would urge my colleagues to reconsider the decision to establish it as a fixed feature of the California constitutional guarantee.

A.

The idea that an accused must in all cases affirmatively show prejudice before a trial court may dismiss the

charges for violation of the constitutional right to a speedy trial is apparently traceable to *Jones* v. *Superior Court* (1970) 3 Cal.3d 734, 740 [91 Cal.Rptr. 578, 478 P.2d 10]. Before *Jones,* an unreasonable or oppressive delay in bringing an accused to trial could result in dismissal of the charges regardless of actual prejudice. "When there has been an extended delay in bringing a defendant to trial, '*it is not necessary that the party accused affirmatively show prejudice.* . . . It is enough for the defendant to show that the prosecution has been unreasonably delayed. It will not be presumed that good cause for the delay in fact existed. If there was any good cause it was for the prosecution to show it.' (*Harris* v. *Municipal Court, supra,* 209 Cal. 55, 64[.])" (*Barker* v. *Municipal Court* (1966) 64 Cal.2d 806, 812 [51 Cal.Rptr. 921, 415 P.2d 809], italics added; see also *McCullar* v. *Superior Court* (1968) 264 Cal.App.2d 1, 4 [70 Cal.Rptr. 21]; *Zimmerman* v. *Superior Court* (1967) 248 Cal.App.2d 56, 61 [56 Cal.Rptr. 226]; *Rost* v. *Municipal Court* (1960) 184 Cal.App.2d 507, 512-513 [7 Cal.Rptr. 869].)

In *People* v. *Archerd* (1970) 3 Cal.3d 615 [91 Cal.Rptr. 397, 477 P.2d 421], this court considered what rules should apply when an accused claims

[40 Cal.3d 266]

there has been an unreasonable delay in arresting and charging him. *Archerd* held that the speedy trial right had no application to such a claim. "One does not become an accused until the filing of a complaint. The provisions of the Sixth Amendment contemplate a pending charge, not the mere possibility of a criminal charge." (*Id.,* at p. 639.) However, *Archerd* did not find that due process could be violated by a preaccusatory delay — if the delay were purposeful, oppressive, and prejudicial to the accused's

ability to defend himself. (*Id.*, at p. 640.) Thus, *Archerd* established prejudice as an essential element of a *due process claim.*

Jones was filed a few weeks after *Archerd.* Addressing a postcomplaint delay to which the speedy trial right *was* applicable (3 Cal.3d at pp. 738-740), *Jones* held that to determine whether that right was violated "[t]he prejudicial effect of the delay on petitioner must be weighed against any justification for the delay." (*Id.* at p. 740.) In a footnote which appears to be the root source of the majority's holding, *Jones* linked the speedy trial test to *Archerd*'s preaccusatory due process test: "[A] claimed denial of due process would be decided by the same approach, namely, balancing the effect of the delay on the defendant against any justification for the delay." (*Id.*, at p. 741, fn. 1.)

It should be pointed out that *Jones* itself did not treat the prejudice factor as a threshold requirement. It found that the delay was both unreasonable and prejudicial to the accused and that dismissal of the charge was therefore required. (*Jones, supra,* 3 Cal.3d at pp. 740-741.) It did not consider whether dismissal would be required if only an unreasonable delay had been established. It certainly did not purport to overrule such earlier cases as *Harris* v. *Municipal Court, supra,* 209 Cal. 55 which, as the majority note, recognized a presumption of prejudice from an unreasonable delay. (Maj. opn., *ante,* at 253-254.)

A year and a half after *Jones,* the United States Supreme Court decided *Barker* v. *Wingo* (1972) 407 U.S. 514 [33 L.Ed.2d 101, 92 S.Ct. 2182]. *Barker* expressly did *not* require a threshold showing of prejudice in order to establish a speedy trial violation. On the contrary, it adopted a balancing test in which actual prejudice was

only the fourth (and final) factor to weigh. (*Id.* at pp. 530-533 [33 L.Ed.2d at pp. 116-119].)

Under *Barker,* a court must first inquire into the length of the delay and the reasons for it. A sufficiently long delay, *Barker* held, may be presumptively prejudicial. A sufficiently long delay caused by improper or oppressive governmental motives might in itself be grounds for dismissal. (*Ibid.*) As the United States Supreme Court would later explain, "*Barker* v. *Wingo* expressly rejected the notion that an affirmative demonstration of prejudice

[40 Cal.3d 267]

was necessary to prove a denial of the constitutional right to a speedy trial[.]" (*Moore* v. *Arizona* (1973) 414 U.S. 25, 26 [38 L.Ed.2d 183, 185, 94 S.Ct. 188].)

This court's first post-*Barker* case was *Sykes* v. *Superior Court* (1973) 9 Cal.3d 83 [106 Cal.Rptr. 786, 507 P.2d 90].[1] *Sykes* declined to apply *Barker*'s balancing test to a delay which was covered by the state constitutional guarantee but not by the statutory speedy trial provision. (*Id.,* at pp. 90-92; see Pen. Code, § 1382.) However, *Sykes* extended the statutory 60-day rule to cover the case at bench and bottomed its decision on the equal protection clause. (9 Cal.3d at p. 92.) Application of the statute, of course, meant that the case had to be dismissed regardless of prejudice. (*Id.,* at pp. 88-89; *People* v. *Wilson, supra,* 60 Cal.2d at p. 151.)[2] *Sykes* left open the possibility

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[1]*People* v. *Mitchell* (1972) 8 Cal.3d 164 [104 Cal.Rptr. 348, 501 P.2d 916], filed a few months after *Barker,* simply affirmed a lower court's dismissal on speedy trial grounds without discussion of *Archerd, Jones,* or *Barker.*

[2]*Barker* had expressly approved the idea that the states could adopt by statute reasonable time periods which would define when

that the *Barker* test or a similar one would apply where there was no applicable statute. In fact, *Sykes* noted that the balancing test used in *Jones* reached the same result as *Barker*. (9 Cal.3d at p. 93.)

The first case to acknowledge that a threshold prejudice requirement was inconsistent with *Barker* v. *Wingo* was *Crockett* v. *Superior Court* (1975) 14 Cal.3d 433 [121 Cal.Rptr. 457, 535 P.2d 321]. *Crockett* found that where charges once dismissed under Penal Code section 1381 were refiled as permitted by section 1387, the accused was entitled to a second dismissal only if his constitutional right to a speedy trial was violated. (*Id.*, at p. 440.) *Crockett* then found that a state constitutional claim must rest on an initial showing of prejudice, and that no such showing had been made in the case at bench. However, in a footnote the court noted the possibility that a federal constitutional claim under *Barker* v. *Wingo* might prevail. (*Ibid.*, fn. 8.) Justices Mosk and Tobriner, dissenting, would have required dismissal without any showing of prejudice where the delay is extended (citing *Barker* v. *Municipal Court, supra,* 64 Cal.2d at p. 812) or where it exceeds applicable statutory time periods (citing *Sykes, supra,* 9 Cal.3d at p. 89). (*Crockett, supra,* 14 Cal.3d at pp. 445-446.)

Next came *People* v. *Hannon, supra,* 19 Cal.3d 588, which addressed another aspect of the speedy trial right: when does it attach? *Hannon* found that under federal law (*United States* v. *Marion, supra,* 404 U.S. 307) the right did not attach in a felony prosecution at the time the complaint was

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the speedy trial right was violated. (*Barker, supra,* 407 U.S. at p. 523 [33 L.Ed.2d at pp. 112-113].)

filed.[3] *Hannon* rejected this as an interpretation of the California guarantee. It noted that California had historically extended the protection of the speedy trial right to the prearrest stage in cases where a complaint has been filed charging a felony. (*Hannon, supra,* 19 Cal.3d at p. 607.) It declined to retreat from this position simply to follow the federal rule: " '[O]ur first referent is California law and the full panoply of rights Californians have come to expect as their due. . . .' [¶] . . . We continue to adhere to that *higher standard of protection against the abuses of pretrial delay.*" (*Id.,* at pp. 606-608, fn. omitted, italics added.)

However, in analyzing the claim of speedy trial violation in the case before it, *Hannon* applied the old balancing test of *Jones.* It found the right had not been violated by a seven-month delay between complaint and arrest, since there was neither prejudice to the accused nor unreasonable behavior by the police. (*Id.,* at pp. 608-610.)

Finally, there was *Scherling* v. *Superior Court, supra,* 22 Cal.3d 493. *Scherling,* like *Archerd,* involved a precomplaint, prearrest delay to which the speedy trial right was inapplicable. (*Id.,* at p. 505.) Turning to the due process claim, *Scherling* considered the accused's proffered showing of prejudice, as required by *Archerd.* Finding that no prejudice had been established, *Scherling* declined to

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[3] *Marion*'s requirement that there be "actual restraints imposed by arrest and holding to answer a criminal charge" before the Sixth Amendment came into play (404 U.S. at p. 320 [30 L.Ed.2d at p. 479]) meant that the federal right did not attach in California at least until a magistrate ordered the accused bound over for trial following a preliminary examination. (*Hannon, supra,* 19 Cal.3d at p. 588.)

inquire into the justification for the delay. (*Id.*, at pp. 506-507.) Though *Scherling* noted that a speedy trial claim would be reviewed in the same manner (*id.*, at p. 505), it made no mention of whether such review would be appropriate under *Barker* v. *Wingo*.

B.

The logical flaw in imposing a threshold prejudice requirement is that it takes too narrow a view of the interests which the speedy trial right protects. Those interests are not limited to the ability to defend against the charges. They include as well preventing oppressive pretrial incarceration and minimizing the anxiety and concern of the accused. (*Barker* v. *Municipal Court, supra,* 64 Cal.2d at p. 813; *Barker* v. *Wingo, supra,* 407 U.S. at p. 532 [33 L.Ed.2d at p. 118]; *United States* v. *Marion, supra,* 404 U.S. at p. 320: "[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously

[40 Cal.3d 269]

interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." See also *United States* v. *MacDonald* (1982) 456 U.S. 1, 7-8 [71 L.Ed.2d 696, 703-704, 102 S.Ct. 1497].)

Another purpose of the speedy trial right is to protect against oppressive or negligent governmental delay in bringing cases to trial. Underlying this right is the belief that once charges have been filed, governmental delay must be justified by necessity. "The government cannot take property from the meanest inhabitant, without just compensation paid or tendered in advance; but it takes his liberty, which it has been justly said is to some extent to take his life, upon a mere charge of crime. This is necessary, that society may be protected. But necessity is the only excuse, and to imprison beyond what is absolutely necessary is tyrannous and oppressive. And that is precisely what the state has covenanted with each inhabitant that it will not do." (*In re Begerow* (1901) 133 Cal. 349, 352 [65 P. 828].) Thus, charges have been ordered dismissed when the delay is lengthy and unjustified, regardless of its actual effect on the defense at trial. (*Barker* v. *Municipal Court, supra,* 64 Cal.2d at p. 812; *Harris* v. *Municipal Court, supra,* 209 Cal. at pp. 62-63.)

These purposes are distinct from those protected by the prearrest due process right. Were they not, there would be no point in determining the point at which the speedy trial right attaches. (See *Hannon, supra,* 19 Cal.3d at pp. 603-608.)

The due process right protects the fairness of the trial itself. (*United States* v. *MacDonald, supra,* 456 U.S. at p. 8 [71 L.Ed.2d at p. 704]; see *United States* v. *Lovasco* (1977) 431 U.S. 783, 790 [52 L.Ed.2d 752, 759, 97 S.Ct. 2044], rehg. den., 434 U.S. 881 [54 L.Ed.2d 164, 98 S.Ct. 242].) The harm to the accused from extended pretrial delays has been compared to the harm from governmental suppression of material witnesses or evidence. (*United States* v. *Marion, supra,* 404 U.S. at p. 324 [30 L.Ed.2d at pp. 480-481]; see also *People* v. *Alvarado* (1968) 258

Cal.App.2d 756 [66 Cal.Rptr. 41].) Thus, it is logical to require a showing of actual prejudice concerning the ability to defend, in order to trigger an inquiry into whether a governmental delay in initiating prosecution has made a trial unfair.

Furthermore, at the preaccusatory stage courts are reluctant to scrutinize whether a delay was really necessary. Both this court and the United States Supreme Court have recognized the difficulty of trying to second guess the pace at which law enforcement investigation should proceed or the moment at which the decision to file charges should be made. (*Archerd, supra,* 3

[40 Cal.3d 270]

Cal.3d at p. 640; *United States* v. *Lovasco, supra,* 431 U.S. at pp. 790-796 [52 L.Ed.2d at pp. 759-763].) The threshold prejudice requirement ensures that this inquiry need be made only in those select cases where the accused has suffered harm.

Once charges are brought, however, the interests at stake are different. The state's need to investigate is presumably satisfied once it has filed charges. At this stage an inquiry into the reasons for delay does not involve judicial interference with law enforcement. At the same time, the state has tolled the statute of limitations, which is the accused's primary protection against the prejudice inherent in defending against a stale charge. (*United States* v. *MacDonald, supra,* 456 U.S. at p. 8; *Archerd, supra,* 3 Cal.3d at p. 639.) Moreover, the other interests protected by the speedy trial right come into play, as does "the duty of all courts and judicial officers and of all counsel, both the prosecution and the defense, to expedite . . . proceedings to the greatest degree that is

consistent with the ends of justice." (Pen. Code, § 1050; see *Sykes, supra*, 9 Cal.3d at p. 88.)

At this stage, it makes no sense to set up a threshold requirement that the accused show prejudice to his ability to defend before there can be an inquiry into the length of and reasons for the state's delay. The federal Constitution contains no such requirement, and I would not read one into the California Constitution.

LUCAS, J. — I respectfully dissent. The majority fails to cite convincing caselaw or policy justifications to support its holding that a misdemeanant's federal speedy trial rights attach upon the filing of a complaint even though no arrest has yet occurred. The United States Supreme Court has never extended speedy trial rights to prearrest delays and our own court has held that the filing of a criminal complaint does not trigger the federal speedy trial guarantee. (*People* v. *Hannon* (1977) 19 Cal.3d 588 [138 Cal.Rptr. 885, 564 P.2d 1203].) The majority's attempt to distinguish *Hannon* is unsuccessful and its attempt to link the filing of a misdemeanor complaint with the policies underlying the speedy trial clause of the Sixth Amendment are either misguided or based on unsupported speculation.

The Sixth Amendment states that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." (U.S. Const., 6th Amend.) Our task therefore is to decide when a misdemeanor suspect becomes an "accused" for purposes of the speedy trial clause. In a passage applicable to the present case, the United States Supreme Court explained the interests protected by the speedy trial provision: "The Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily

by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." (*United States* v. *MacDonald* (1982) 456 U.S. 1, 8 [71 L.Ed.2d 696, 704, 102 S.Ct. 1497].)

MacDonald establishes that not all criminal accusations automatically trigger the protections of the speedy trial provision. The only ones so affected are those that present a realistic possibility of (1) pretrial incarceration, (2) anxiety to the accused, or (3) public scorn arising from widespread knowledge of the charges. All three interests are clearly implicated if a suspect is arrested and charged with a felony or a misdemeanor. Therefore, arrest of a suspect, providing he is subsequently charged, will always trigger the federal speedy trial provision. But the high court has never extended speedy trial rights to an accused before that court prior to his arrest,[1] and *United States* v. *Marion, supra,* 404 U.S. 307, 320-322 [30 L.Ed.2d

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[1]See, for example, *United States* v. *MacDonald, supra,* 456 U.S. 1, *United States* v. *Lovasco* (1977) 431 U.S. 783 [52 L.Ed.2d 752, 97 S.Ct. 2044], *Moore* v. *Arizona* (1973) 414 U.S. 25 [38 L.Ed.2d 183, 94 S.Ct. 188], *Barker* v. *Wingo* (1972) 407 U.S. 514 [33 L.Ed.2d 101, 92 S.Ct. 2182], and *United States* v. *Marion* (1972) 404 U.S. 307 [30 L.Ed.2d 468, 92 S.Ct. 455]. Even the dissenting opinions of the high court have argued for applying speedy trial protection for prearrest delays only when the suspect is aware of the investigation, a situation that does not exist in the present case. (See, e.g., *MacDonald, supra,* at pp. 12-21 [71 L.Ed.2d at pp. 706-712] [dis. opn. by Marshall, J.]; *Lovasco, supra,* at pp. 797-800 [52 L.Ed.2d at pp. 763-765] [dis. opn. by Stevens, J.].)

468, 478-480], indicates that the court is not convinced that speedy trial rights should *ever* attach before a suspect is arrested.

In *Marion* the court stated, "[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment. [¶] Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. *But we decline to extend the reach of the amendment to the period prior to arrest.* Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who had been arrested and held to answer. Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. But this possibility of prejudice at trial is

[40 Cal.3d 272]

not itself sufficient reason to wrench the Sixth Amendment from its proper context." (*Id.*, at pp. 320-322, italics added, fns. omitted.)[2]

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[2]There is other evidence in *Marion* that the court considered only postarrest delays as relevant to speedy trial claims. As an example of a legislative interpretation of the speedy trial right, the court cited Federal Rules of Criminal Procedure, rule 48(b) (28 U.S.C.) which "authorizes dismissal of an indictment, information, or complaint '[i]f there is unnecessary delay . . . in bringing a defendant to trial . . . .' *The rule clearly is limited to post-arrest situations.*" (*Marion, supra,* 404 U.S. at p. 319 [30 L.Ed.2d at p. 478], italics added.) This is the only passage in *Marion* that specifically mentions a complaint.

Moore v. *Arizona, supra,* 414 U.S. 25, 27 [38 L.Ed.2d 183, 186], similarly implies that prearrest delays may be outside the purview of the federal speedy trial guarantee. There, the court reiterated the disabilities caused by "[i]nordinate delay"[3] and observed that " 'they are inevitably present in every case to some extent, for *every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty.*' [Citation.]" (*Ibid.,* italics added; see also *Barker* v. *Wingo, supra,* 407 U.S. 514, 532-533 and fn. 33 [33 L.Ed.2d 101, 118-119].)

Although the court in *Marion* concluded that the speedy trial rights of the defendants in that case attached upon their indictment (*Marion, supra,* 404 U.S. at p. 313 [30 L.Ed.2d at p. 474]), the defendants were apparently indicted and arrested on the same day. Furthermore, *Marion*'s holding cannot be read in isolation from the court's clear refusal to extend speedy trial rights to the prearrest period. Even, assuming arguendo, that issuance of an *indictment* prior to arrest may trigger the federal speedy trial provision,[4] the majority is unjustified in

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[3]The court commented that delay following arrest, " 'wholly aside from possible prejudice to a defense on the merits, may "seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States* v. *Marion,* 404 U.S. 307, 320 (1971).' " (414 U.S. at p. 27 [38 L.Ed.2d at p. 186].)

[4]Several federal appellate courts have held that speedy trial rights are triggered by indictment, information, or arrest, *whichever occurs first.* (See, e.g., *United States* v. *Milhim* (5th Cir. 1983) 702 F.2d 522, 525; *United States* v. *Gonzales* (11th Cir. 1982) 671 F.2d 441, 444, cert. den. *Gonzales-Hernandez* v. *United States,* 456 U.S. 994 [73 L.Ed.2d 1291, 102 S.Ct. 2279]; *United States* v. *Cordova* (9th Cir. 1976) 537

extending speedy trial rights to a suspect upon the date a *complaint* is filed. An indictment, of course, follows a determination by a neutral factfinder (i.e., a grand jury) that there is probable cause to believe a suspect has committed a crime.[5] A complaint, on the other hand, may be filed merely on the information and belief of an interested party (e.g., a policeman or the district attorney). Given the different origins

[40 Cal.3d 273]

of these two kinds of pleading, as well as the disparity in the severity of the crimes involved, it is evident that the typical grand jury indictment will normally have a greater impact on the accused and the public than the filing of the typical misdemeanor complaint.

Indeed, we recognized the difference between a complaint and an indictment for speedy trial purposes in our decision in *People* v. *Hannon, supra,* 19 Cal.3d 588, when we revised our interpretation of the Sixth Amendment originally stated in *Jones* v. *Superior Court* (1970) 3 Cal.3d 734 [91 Cal.Rptr. 578, 478 P.2d 10]. In *Jones,* without distinguishing between misdemeanors and felonies, we held that a suspect's federal and state speedy trial rights attach upon the "filing of a complaint or other charge." (*Jones,* at p. 739.) However, seven years later, in *Hannon,* we reinterpreted the federal speedy trial clause, stating, "In contrast to the conclusion we reached in *Jones,* . . . the language used by the Supreme Court in

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F.2d 1073, 1075, cert. den. 528 U.S. 960 [50 L.Ed.2d 327, 97 S.Ct. 385].) The United States Supreme Court, however, has never so held.

[5]An information also follows a probable cause determination by a neutral factfinder (i.e., a magistrate), but this can only occur *after* the suspect has been arrested or concedes jurisdiction. (Pen. Code, § 738.)

delineating the scope of protection afforded by the federal charter was more limited than that which we adopted in *Jones:* '[I]t is either a formal indictment or information *or else the actual restraints imposed by arrest and holding to answer a criminal charge* that engage the particular protections of the speedy trial provision of the Sixth Amendment.' ([Citing *Marion, supra,* 404 U.S.] at p. 320, italics added.) Insofar as the filing of an indictment or information is concerned the Supreme Court's holding is coextensive with our decision in *Jones.* . . . On the other hand, . . . we conclude that the Supreme Court intended by its use of the foregoing phrase to hold that the filing of a complaint is by itself insufficient to trigger the protection of the right to a speedy trial under the federal Constitution." (*Hannon, supra,* at pp. 605-606, italics in original.)

That we made no distinction between felony and misdemeanor complaints in our *Hannon* analysis is evidenced by our later remark that the "United States Supreme Court has apparently concluded that the Sixth Amendment guarantee of the right to a speedy trial does not extend to the prearrest stage when the sole accusation against an individual consists of the filing of a *criminal* complaint." (*Id.,* at p. 608, italics added.) A misdemeanor complaint is equally a *criminal* complaint.

The majority nonetheless attempts to confine *Hannon*'s holding to felony complaints.[6] It notes that felony complaints are not "accusatory pleadings"; they only give a magistrate jurisdiction to conduct a preliminary hearing to determine if there is probable cause to bind a defen-

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[6]Interestingly, the majority cites *Jones,, supra,* as applicable to *misdemeanors.* (*Ante,* p. 248.) Yet, it insists that *Hannon,* which expressly reinterpreted *Jones,* applies only to felonies.

dant over for trial. A misdemeanor complaint, on the other hand, gives a municipal court judge

[40 Cal.3d 274]

jurisdiction to try the case. Granting this jurisdictional distinction between felony and misdemeanor complaints, the majority fails to show how it is relevant to the policies underlying the speedy trial clause. The weakness of the majority's approach is demonstrated by its reliance on *State* v. *Gee* (1984) 298 Md. 565 [471 A.2d 712].

In *Gee,* the Maryland Supreme Court relied on *Kirby* v. *Illinois* (1972) 406 U.S. 682, 689 [32 L.Ed.2d 411, 92 S.Ct. 1877], to determine when a suspect's *speedy trial rights* attach. (See *Gee, supra,* 471 A.2d at pp. 715-716.) *Kirby,* however, analyzed the Sixth Amendment *right to counsel* and has no bearing on when the right to speedy trial attaches. The United States Supreme Court made this distinction abundantly clear only last term when it reversed the Ninth Circuit for using speedy trial analysis to determine when the right to counsel attaches. (*United States* v. *Gouveia* (1984) — U.S. — , — [81 L.Ed.2d 146, 155, 104 S.Ct. 2292].) The high court expressly declared that the speedy trial guarantee need not attach at the same time as the right to counsel because they "protect different interests." (*Ibid.*)

Apparently the majority believes a suspect is "accused" to a greater extent upon the filing of a misdemeanor complaint because of its jurisdictional function. But to define an "accused" for speedy trial purposes, one must look to the interests protected by that right. For example, courts have held that issuance of a *sealed* indictment cannot invoke the speedy trial rights of the person indicted. (*United States* v. *Watson* (2d Cir. 1979) 599 F.2d 1149; *United States* v. *Hay* (10th Cir. 1975) 527 F.2d 990.)

As stated in *Watson,* "Because neither the indicted defendant nor the public has notice of the charges, such an indictment does not bring about 'the major evils protected against by the speedy trial guarantee' [citation], namely, public obloquy and anxiety to the accused." (599 F.2d 1149, 1156, fn. 5.) In a similar vein, I fail to see why delays following a misdemeanor complaint filing would cause any greater cognizable harm than delays following a felony complaint filing.

In summary, the relevant United States Supreme Court decisions not only do not support the majority's holding, but our own decision in *People* v. *Hannon, supra,* 19 Cal.3d 588, directly contradicts it. Furthermore, neither the majority's research nor my own discloses any case after *Marion, supra,* 404 U.S. 307, that invokes a defendant's federal speedy trial rights upon the filing of a complaint prior to arrest, information, or indictment. (See *ante,* p. 256.)[7]

[40 Cal.3d 275]

In addition to the lack of supporting case authority, the majority also fails to link successfully their result with the interests protected by the speedy trial provision. The majority first notes that a delay such as occurred in the present case will likely cause witnesses to disappear, memories to fade, and evidence to vanish. (*Ante,* p. 251.) It bears emphasis here that these consequences will inevi-

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[7]Although three of the cases cited do specifically mention a complaint as triggering the federal speedy trial guarantee, they do so only in dicta and without analysis. When read in [p. 275] context, the cases support only the proposition that the federal guarantee does not extend to delays prior to arrest, indictment, or information. (See *People* v. *Velasquez* (Colo. 1982) 641 P.2d 943; *Commonwealth* v. *Conant* (1981) 12 Mass.App. 287 [423 N.E.2d 1035]; *People* v. *Nichols* (1978) 60 Ill.App.3d 919 [18 Ill.Dec. 330, 377 N.E.2d 815].)

tably result from any long delay, including a precomplaint delay, and they are as likely to benefit defendant as to prejudice him. Perhaps for this reason, the United States Supreme Court has clearly held that such consequences are a concern of the due process clause of the Fifth Amendment, *not* the speedy trial clause of the Sixth Amendment. (*MacDonald, supra,* 456 U.S. at p. 8.) To state a due process claim, a defendant must prove actual prejudice, which the majority concedes defendant has been unable to do in the present case.

Next, the majority speculates that a delay following the filing of a misdemeanor complaint may disrupt the accused's life "by affecting his credit rating, job applications, admission to schools and other activities in which background checks are routine." (*Ante,* p. 261.) Other than observing that misdemeanor complaint filings may be published, the majority does not indicate how widespread public knowledge may come about. One would suppose that, absent arrest, the typical misdemeanor complaint filing, of which thousands throughout the state occur daily, would be a rather unnewsworthy event.[8] Furthermore, although some employers and schools may routinely check misdemeanor filings, the majority provides no estimate of how prevalent this practice may be. Most significantly, the majority fails to explain why this parade of horribles follows from the filing of a misdemeanor complaint, *but not a felony complaint.*[9]

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[8]According to the 1985 Annual Report of the Judicial Council of California, table A-30, at page 215, there were 717,974 nontraffic misdemeanor and infraction filings in California in the fiscal year 1983-1984. The total excludes felonies reduced to misdemeanors.

[9]Additionally, the majority points out the supposed unfairness in postponing possible punishment for years while the suspect leads a blameless life. First, the majority ignores the possibility that the

In conclusion, the majority's position is unsupported by the relevant caselaw, and its invocation of the interests protected by the federal speedy trial right rests only on surmise. I remain unconvinced there is any federal constitutional basis for extending speedy trial rights to the "prearrest stage

[40 Cal.3d 276]

when the sole accusation against an individual consists of the filing of a criminal complaint." (*Hannon, supra,* 19 Cal.3d at p. 608.)

I would deny the peremptory writ.

Kaus, J.,* concurred.

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suspect might be more than happy to postpone punishment. Second, the defendant in the present case was arrested after he passed out from overindulgence of PCP; we are not presented with the hypothetical defendant who shows no need for rehabilitation. Again, the majority's worries are based on mere speculation.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

[40 Cal.3d 702a]
[L.A. No. 31856. Dec. 19, 1985.]

JOAQUIN MARIO SERNA, Petitioner v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
THE PEOPLE, Real Party in Interest.

[Modification* of opinion (40 Cal.3d 239; — Cal.Rptr. —, — P.2d —).]

THE COURT. — The filed opinion herein is hereby modified in the following respects:

The first full paragraph commencing on page 16 (40 Cal.3d 239, advance report, p. 252, last par., and p. 253, lines 1-30) is modified to read:

"We agree that the delay here was presumptively prejudicial. The length of the delay between the filing of the complaint and the arrest of defendant far exceeded the one-year limitation period applicable to misdemeanors generally. Had there been no complaint on file this prosecution would have been statutorily barred. Statutes of limitation reflect a legislative construction of the speedy trial guarantee. (*Barker* v. *Municipal Court* (1966) 64 Cal.2d 806, 812, [51 Cal.Rptr. 921, 415 P.2d 809].) Although the period of limitation for some misdemeanors

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*This modification requires editorial changes in headnotes (6a, 6b) and (7a, 7b), pages 242-243 of the advance report. In the bound volume report, headnote (6a, 6b), page 242, lines 12-13 will be changed to read: "plaint and the arrest exceeds one year. Thus, a defendant in . . . ." In headnote (7a, 7b), page 243, the last sentence will be changed to read: "Although there may be cases in which a defendant is able to demonstrate actual prejudice from delays of shorter duration, he need not do so when the delay exceeds one year." Movement of text will be made affecting pages 253-276 of the bound volume report.

which might have been charged as felonies is now three years (see § 805), the one-year period of limitation for "any misdemeanor" was part of the Penal Code on its adoption in 1872. (See former § 801.) A court may appropriately conclude that delays between the filing of a complaint and the arrest of a defendant which exceeds the typical one-year period of limitation generally applicable to misdemeanors are unreasonable and thus presumptively prejudicial within the contemplation of the speedy trial guarantee. "[T]he concept of a period of limitation developed in recognition of the ever increasing difficulty faced by both the government and a criminal defendant in obtaining reliable evidence (or any evidence at all) as time passes following the commission of a crime . . . .

[40 Cal.3d 702b]

[¶] Other policy considerations which underlie the concept of a period of limitation vary in purpose. The possibility of self-reformation by the criminal offender may lessen the need for society to impose corrective sanctions and society's impulse for retribution may correspondingly diminish as time passes. . . . Finally, adoption of a period of limitation represents a legislative recognition that for all but the most serious of offenses (such as murder or kidnaping) a never-ending threat of prosecution is more detrimental to the functioning of a civilized society than it is beneficial." (*People* v. *Zamora* (1976) 18 Cal.3d 538, 546-547 [134 Cal.Rptr. 784, 557 P.2d 75].) It would be anomalous in light of the congruent objectives of the speedy trial guarantee and the legislatively adopted one-year period of limitation that has governed misdemeanors for over a century if, after a decision has been made to prosecute an offense as a misdemeanor, the mere filing of a misdemeanor complaint without further action by the

state for a period in excess of one year were not presumed to be a violation of the right to speedy trial, and the People compelled to justify the delay."

The first sentence in the first full paragraph commencing on page 17 (40 Cal.3d at p. 253, 1st full par., line 4) is modified to substitute "one year" for "the statutory period of limitation."

The last sentence commencing on page 18 (40 Cal.3d at p. 254, lines 6-14) is modified to read: "Although this manifests a legislative conclusion that the delay between the filing of the complaint and arraignment should not be considered in determining if a delay in bringing a misdemeanor defendant to trial is unreasonable, the one-year period of the generally applicable misdemeanor statute of limitations remains as a touchstone for measuring the reasonableness of a delay between complaint and arrest."

The first sentence of the first full paragraph commencing on page 19 (40 Cal.3d at p. 254, 1st full par., lines 4-6) is modified to sutstitute "one-year" for "the period of limitation established by the Legislature."

The last full sentence commencing on page 37 (40 Cal.3d at p. 263, 1st full par., line 25) is modified by the insertion of the word "felony" prior to the word "defendant." The last sentence commencing on page 37 (40 Cal.3d at p. 263, 1st full par., line 32) is modified by inserting the word "felony" before the word "defendant" on the last line of that page (in the second clause of that sentence).

The second and third sentences of the first full paragraph on page 38 (40 Cal.3d at p. 263, 2d full par., lines 3-9) are modified to read: "When, in a proper *Barker* v. *Wingo* hearing a Sixth Amendment speedy trial violation

has been established, reversal of a subsequent judgment of conviction and

[40 Cal.3d 702c]

dismissal of the charge are necessary in every case. When unjustified prejudice to the defendant's ability to defend has been established there can be no question that reversal and dismissal are required."

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR
2d B001475

JOANQUIN MARIO SERNA,
Petitioner,
v.
SUPERIOR COURT OF THE
COUNTY OF LOS ANGELES,
Respondent,
THE PEOPLE,
Real Party in Interest.
(Sup.Ct.No. C 456799;
James N. Reese, Judge)
(L.A. Muni.Ct.No. 31106954;
Veronica Simmons McBeth, Judge)

O R D E R

Filed: December 20, 1983

THE COURT:*

The petition for writ of mandate filed September 30, 1983, pursuant to section 904.1, subdivision (a), of the Code of Civil Procedure, has been considered and is denied. This result is controlled by *Overby* v. *Municipal Court* (1979) 121 Cal.App.3d 377, 386.

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*WOODS, P.J., AMERIAN, J.

I would issue the Alternative Writ.
*KINGSLEY, J.,

Dept. 70
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES
C 456 799 (M.C. No. 31106954)
JOAQUIN MARIO SERNA
VS.
THE MUNICIPAL COURT OF THE
LOS ANGELES JUDICIAL DISTRICT
AND
PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest
Honorable James N. Reese, Judge
B. J. Schneider, Deputy Clerk
Annette Schmitt, Reporter
HEARING ON PETITION FOR WRIT OF MANDATE

Counsel for Plaintiff: Wilbur F. Littlefield, Public Defender, by John Hamilton Scott

Counsel for Defendant: Ira Reiner, City Attorney, by Greg Wolff

Date: September 22, 1983

Matter comes on for hearing.

The Court has read and considered the verified petition and supporting points and authorities, the record of the trial court proceedings, the answer of real party in interest, and the reply thereto, and now considers oral argument.

Matter is taken under submission.

LATER, the Court rules as follows:

Petition is DENIED.

Counsel for real party in interest is directed to prepare, serve, and submit to this court the form of judgment.

Copies of this minute order are transmitted this date, addressed as follows:

Los Angeles County Public Defender
Appellate Division
19-513 Criminal Courts Building
210 West Temple St.
Los Angeles, CA 90012

Presiding Judge
Los Angeles Municipal Court
110 N. Grand Ave.
Los Angeles, CA 90012

City Attorney
Appellate Division
1700 City Hall East
Los Angeles, CA 90012

Order Due: December 23, 1985

ORDER DENYING REHEARING
LA No. 31856
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

JOAQUIN MARIO SERNA

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent

PEOPLE,
Real Party in Interest

Opinion modified.

Appellant's petition for rehearing DENIED.

Lucas J., is of the opinion the petition should be granted.

BIRD
Chief Justice

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
No. L.A. 31856
(LASC No. C-456799)
JOAQUIN MARIO SERNA,
Petitioner,
v.
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent,
THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

PEREMPTORY WRIT OF MANDATE

TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES:

GOOD CAUSE APPEARING THEREFOR and pursuant to the judgment of this court entered October 24, 1985 (as modified December 19, 1985), and the remittitur filed December 20, 1985, it is hereby ordered that you vacate and set aside your order denying the petition for writ of mandate in the case entitled "Serna v. Municipal Court", case number C-456799, and that you enter a new and different order issuing a writ of mandate directed to the Municipal Court of the Los Angeles Judicial District. That writ shall compel the municipal court to vacate and set aside its order of May 16, 1983, denying petitioner's motion to dismiss misdemeanor complaint number 31106954, and shall direct that court to thereafter conduct further proceedings upon petitioner's motion consis-

tent with the views of the California Supreme Court in *Serna* v. *Superior Court* (1985) 40 Cal.3d 239.

Dated: January 15, 1986

LAURENCE P. GILL,
Clerk of the Supreme Court of
the State of California
By A. JOHNSON
Deputy

COPY

Supreme Court, U.S.
FILED
MAR 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1365

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

JOAQUIN MARIO SERNA,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILBUR F. LITTLEFIELD, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

Laurence M. Sarnoff,
John Hamilton Scott,
Deputy Public Defenders

Appellate Division
210 West Temple Street, 19th floor
Los Angeles, California 90012

Telephone: (213) 974-3050

Attorneys for Respondent

35pp

QUESTIONS PRESENTED

1) Is a criminal defendant an "accused" within the meaning of the speedy trial guarantees of the Sixth Amendment when a formal accusatory pleading has been filed and is pending against the defendant?

2) Are the States still free to prescribe a reasonable time period after accusation beyond which unjustified delay in trial shall be deemed violative of the Sixth Amendment?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2-8
ARGUMENT	8-25
I. A DEFENDANT IS AN "ACCUSED" WITHIN THE MEANING OF THE SIXTH AMENDMENT UPON THE FILING OF THE ACCUSATORY PLEADING AND WHILE SUCH PLEADING IS PENDING	10-21
II. A STATE COURT MAY ADOPT AN ABSOLUTE TIME LIMIT BEYOND WHICH UNJUSTIFIED DELAY IS PRESUMED TO VIOLATE THE SIXTH AMENDMENT	22-25
CONCLUSION	25-26

TABLE OF AUTHORITIES CITED

Page

Cases

Barker v. Wingo
(1972) 407 U.S. 514 — 18,23

Hoskins v. Wainwright
(5th Cir., 1973) 485 F.2d 1186 — 23

Overby v. Municipal Court
(1981) 121 Cal.App.3d 377 — 4,5,6

Moore v. Arizona
(1973) 414 U.S. 25 — 6,18

State v. Baker
(Tenn., 1981) 614 S.W.2d 352 — 13

State v. Collins
(N.H., 1975) 345 A.2d 162 — 13

State v. Dewey
(La., 1982) 408 So.2d 1255 — 13

State v. Hall
(1981) 129 Ariz. 589 — 13

State v. Smith
(1978) 224 Kan. 662 — 13

Serna v. Superior Court
(1985) 40 Cal.3d 239 — passim

United States v. Cordova
(9th Cir., 1976) 537 F.2d 1073 — 11,14

United States v. Gonzales
(11th Cir., 1982) 671 F.2d 441 — 14

United States v. Hay
(10th Cir., 1975) 527 F.2d 990 — 15

United States v. Hill
(5th Cir., 1980) 622 F.2d 900 — 14

TABLE OF AUTHORITIES (CONT.)

	Page
Cases (Cont.)	
United States v. Jenkins (2nd Cir., 1983) 701 F.2d 850	15,16
United States v. Jones (D.C. Cir., 1975) 524 F.2d 834	12,14
United States v. Loud Hawk (1986) ___U.S.___	13,18
United States v. Lovasco (1977) 431 U.S. 783	19
United States v. MacDonald (1982) 456 U.S. 1	12,18
United States v. Marion (1971) 404 U.S. 307	10,11,12,17,19
United States v. Martin (6th Cir., 1976) 543 F.2d 577	14
United States v. Gouveia (1984) ___U.S.___	13
United States v. Walters (5th Cir., 1979) 591 F.2d 1195	14
United States v. Watson (2nd Cir., 1979) 599 F.2d 1149	15,16
United States v. Williams (9th Cir., 1985) ___F.2d___	18
Statutes	
California Code of Civil Procedure	
§ 904.1, subd. (a)	5

TABLE OF AUTHORITIES (CONT.)

	Page
Statutes (Cont.)	
California Penal Code	
§ 508	3
§ 804, subd. (b)	19
§ 804, subd. (d)	20
Constitutions	
California Constitution, art. I, § 15	4
United States Constitution	
Sixth Amendment	passim
Fourteenth Amendment	2
Text and Others	
Rules of United States Supreme Court	
Rule 17.1(b)	8,21
Rule 17.1(c)	8,21
Los Angeles Times, 12/3/82	16
Los Angeles Times, 10/17/82	16

No. 85-1365

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

JOAQUIN MARIO SERNA,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the California Supreme Court is included in the Appendix to the Petition (A-1 to A-57). It should be noted that until publication of the bound volume of 40 California Reporter, 3rd Series, the modification included at A-54 to A-57 is to be found at 40 Cal.Adv.Repts.3d 702a (1986, pamph. #2).

JURISDICTION

The jurisdictional prerequisites are adequately set forth at page 2 of the Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent portion of the Sixth Amendment to the United States Constitution is set forth at page 2 of the Petition. The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On September 29, 1978, the People of the State of California, through their attorney the City Attorney of the City of Los Angeles, filed a misdemeanor criminal complaint against respondent Joaquin Mario Serna in the Municipal Court of the Los Angeles Judicial

District, County of Los Angeles. In that complaint respondent was accused of the misdemeanor offense of embezzlement, a violation of California Penal Code section 508. The charge was based upon police reports which had been supplied to the prosecutor. Although the facts alleged in those reports are generally set forth in the Petition (pages 2-3), no proof of these facts has ever been presented in any court of law in connection with respondent's motion to dismiss this prosecution. The facts presented in the reports were considered only in connection with the question of whether respondent had made a showing of actual prejudice sufficient to enforce his right to speedy trial under the Constitution of California. (Serna v. Superior Court (1985) 40 Cal.3d 239, 246, fn. 3; App., A-4, fn. 3.)

Respondent was not arrested until February 15, 1983, over four years after the complaint was filed. On April 25, 1983 he filed a written motion in the Municipal Court

to dismiss for lack of speedy trial as guaranteed by the Sixth Amendment to the United States Constitution and by article I, Section 15 of the California Constitution. The Municipal Court denied the motion as based on the California Constitution on the ground that respondent had not made an adequate showing of actual prejudice as required by the State Constitution. (See Serna v. Superior Court, supra, 40 Cal.3d at p. 249; App., A-8.) The Municipal Court denied the motion as based on the United States Constitution on the ground that the filing of the misdemeanor complaint did not activate the protections of the Sixth Amendment. This ruling was based upon a decision of the California Court of Appeal which had held that the federal speedy trial right did not attach until the defendant's State statutory speedy trial right was activated, i.e., at arraignment in misdemeanor cases. (Overby v. Municipal Court (1981) 121 Cal.App.3d 377,

387; a ruling disapproved in Serna v. Superior Court, supra, 40 Cal.3d at p. 262, fn. 16; App., A-30 to A-31, fn. 16.)

On June 15, 1983, respondent filed a petition for writ of mandate in the Superior Court of the State of California for the County of Los Angeles, contesting the order of the Municipal Court. The Superior Court issued an alternative writ of mandate, but following hearing that court upheld the order of the Municipal Court. Insofar as respondent's Sixth Amendment claim is concerned, the Superior Court ruled that respondent's Sixth Amendment rights were not affected by the delay, relying upon Overby v. Municipal Court, supra.

On September 28, 1983, respondent filed a petition for writ of mandate in the California Court of Appeal, Second Appellate District, Division Four, contesting the ruling of the Superior Court. (See Cal. Code Civ. Proc. § 904.1, subd. (a).) By a two-to-

one vote the Court of Appeal summarily denied the petition, again relying upon Overby v. Municipal Court, supra. (App., A-58.)

On December 30, 1983, respondent filed his petition for hearing in the Supreme Court of the State of California. That petition was granted, and the California Supreme Court's opinion was filed on October 24, 1985. Insofar as respondent's federal claim is concerned, the California Supreme Court ruled that the misdemeanor complaint filed against respondent was an "accusatory pleading", the filing of which activated the protections of the Sixth Amendment.

The California Supreme Court noted that this formal charge had been pending against respondent for over four years at the time of his arrest. The court noted that this Court has established that an affirmative showing of prejudice is not a prerequisite for a defendant to show a violation of Sixth Amendment speedy trial rights. (Moore v. Arizona (1973) 414 U.S. 25, 26.) Accordingly, the California Supreme Court ruled that "the

municipal court erred in failing to receive evidence on the considerations relevant to the weighing process and to resolve petitioner's motion to dismiss pursuant to the dictates of Barker v. Wingo [1972] 407 U.S. 514; by weighing the interests of the defendant and the prosecution to determine whether the right was violated in this case." (Serna v. Superior Court, supra, 40 Cal.3d at p. 262; App., A-31.)

The California Supreme Court also stated that "It would be anomalous in light of the congruent objectives of the speedy trial guarantee and the legislatively adopted one-year period of limitations that has governed misdemeanors for over a century if, after a decision has been made to prosecute an offense as a misdemeanor, the mere filing of a misdemeanor complaint without further action by the state for a period in excess of one year were not presumed to be a violation of the right to speedy trial, and the People compelled to justify the delay." (Serna v. Superior Court, supra, 40 Cal.3d at p. 702b;

App., A-55 to A-56.) "Therefore, although there may be cases in which a defendant is able to demonstrate actual prejudice from delays of shorter duration, he need not do so when the delay exceeds one year. Delays of that magnitude are presumptively prejudicial." (Id., at p. 254, as modified, p. 702b; App., A-17, as modified A-56.)

Petitions for rehearing were denied, and the California Supreme Court's remittitur was filed on December 20, 1985. That court's peremptory writ of mandate issued on January 15, 1986. (App., A-62 to A-63.)

ARGUMENT

This Court has, in its Rules, specified the factors bearing on whether a Petition for Writ of Certiorari should be granted. In Rule 17.1(b) it is stated that certiorari may be granted "when a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals." Rule 17.1(c) provides that review in this Court is appropriate "when a state

court . . . has decided a federal question in a way in conflict with applicable decisions of this court."

Under these Rules, certiorari is not appropriate in this case. As will be shown below, the determination of the California Supreme Court that a defendant is an "accused" within the meaning of the Sixth Amendment after formal charges are filed and while such charges are pending is not in conflict with the decision of any state court of last resort, nor any federal court of appeals, nor this Court. Rather, that conclusion is in harmony with every other case ever decided on the issue by those courts, and is compelled by the decisions of this Court.

Although the California Supreme Court's ruling that the right to speedy trial should be conclusively presumed to have been violated by an unjustified delay of over one year in a misdemeanor prosecution is not compelled by federal authority, this court has specifically stated that the States are

free to adopt such constructions of the Sixth Amendment. It has also been determined in federal case authority that prejudice to the accused may be irrelevant in the face of substantial and unjustified delay. Accordingly, the decision is not in conflict with any state or federal authority.

I

A DEFENDANT IS AN "ACCUSED" WITHIN THE MEANING OF THE SIXTH AMENDMENT UPON THE FILING OF THE ACCUSATORY PLEADING AND WHILE SUCH PLEADING IS PENDING

In the landmark case of United States v. Marion (1971) 404 U.S. 307, this Court addressed the question of when a defendant's right to speedy trial as guaranteed by the Sixth Amendment to the United States Constitution attached. This Court noted that the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial

. . . ." (Emphasis added.) This Court stated that "On its face, the protection of the amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." (Id., 404 U.S. at p. 313.) This Court thus determined that the Sixth Amendment was activated by either one of two events, to wit: "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge . . . ." (Id., 404 U.S. at p. 320.)

There has never been any confusion in either the courts of the United States, nor the courts of the several States, as to the meaning of this Court's pronouncement: the date upon which the Sixth Amendment's protections attach "is the date on which the defendant is arrested and held to answer on a criminal charge, or the date on which he is formally charged, whichever is earlier." (United States v. Cordova (9th Cir., 1976) 537 F.2d 1073, 1075, emphasis added.) "It

thus appears established that the sixth amendment right to a speedy trial attaches at the time of arrest or of formal charges, whichever comes first." (United States v. Jones (D.C. Cir., 1975) 524 F.2d 834, 839, fn. 7.) These decisions make it clear that a criminal defendant is "accused" within the meaning of the Sixth Amendment when a formal charging document has been filed against him, whether or not he has been arrested prior to the filing of such a document.

Thus, if this Court should grant certiorari, this Court would be faced with one of two possible options. This Court could either reaffirm its own rulings made over the past 15 years to the effect that a defendant is accused once the accusatory pleading has been filed, and thereby affirm the decision of the California Supreme Court, or else this court would be required to overrule its construction of the Sixth Amendment first made in United States v. Marion, supra, 404 U.S. 307, and restated in such cases as United States v. MacDonald (1982) 456 U.S. 1, United

States v. Gouveia (1984) ___ U.S. ___ [104 S.Ct. 2292], and, in this very term, United States v. Loud Hawk (1986) ___ U.S. ___ [106 S.Ct. 648].

This court's present construction of the Sixth Amendment has been followed in numerous decisions of State and federal courts. The California Supreme Court cited 13 different cases from various States adhering to this same construction of the rule. (Serna v. Superior Court, supra, 40 Cal.3d at p. 258; App., A-23 to A-24.) Many more could be cited as well. (See, for example, State v. Hall (1981) 129 Ariz. 589, 637 P.2d 398; State v. Smith (1978) 224 Kan. 662, 585 P.2d 1006; State v. Dewey (La., 1982) 408 So.2d 1255; State v. Collins (N.H., 1975) 345 A.2d 162; State v. Baker (Tenn., 1981) 614 S.W.2d 352.) Notably, petitioner does not cite a single case from any State which is contrary to this uniform body of law.

The federal courts are equally uniform in holding that a criminal defendant is an "accused" once the accusatory pleading has

been filed. (In addition to Cordova and Jones cited above, see United States v. Martin (6th Cir., 1976) 543 F.2d 577; United States v. Walters (5th Cir., 1979) 591 F.2d 1195; United States v. Gonzales (11th Cir., 1982) 671 F.2d 441.) As was stated by the Court of Appeals in United States v. Hill (5th Cir., 1980) 622 F.2d 900, 909: "The Sixth Amendment clock begins to tick upon indictment when no prior arrest on the alleged offense is involved." (Emphasis added.)

Petitioner claims that this uniform rule has been rejected by two federal circuits, the Second and the Tenth. (Pet., p. 12.) This is incorrect. The Court of Appeal for the Second Circuit recently considered the question of whether or not the Sixth Amendment speedy trial right applied to a 16-month delay following the filing of charges, where there was no evidence that the defendant was aware that the charges had been filed (precisely the situation addressed in the present

case). The Court of Appeals held, in conformance with all other case law, that the defendant was an "accused" during that period of delay. (United States v. Jenkins (2nd Cir., 1983) 701 F.2d 850, 855.)

The cases cited by petitioner, United States v. Watson (2nd Cir., 1979) 599 F.2d 1149 and United States v. Hay (10th Cir., 1975) 527 F.2d 990, concerned the question of whether the Sixth Amendment was violated by reasonable delay following the filing of a sealed indictment. The California Supreme Court has correctly recognized that a misdemeanor complaint in California is in no way equivalent to a sealed (and hence secret) indictment under federal law. The misdemeanor complaint is a public accusation of crime, and thus Watson and Hay (even if correctly decided, which is not conceded) are not in conflict with the ruling of the California Supreme Court and do not support petitioner's argument. (Serna v. Superior Court, supra, 40 Cal.3d at pp. 261-262; App.,

A-28 to A-30.) [1]/ It is, perhaps, stating the obvious to note that the Second Circuit recognized this distinction since that court decided both Watson and Jenkins.

Thus, petitioner has been completely unsuccessful in the attempt to show that the decision of the California Supreme Court is at variance with any state court of last resort, or any federal court of appeals. Instead, as the above-cited authority makes certain, the opinion below is in harmony with

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[1] The claim by petitioner that misdemeanor complaints would probably not be located is specious. The fact that the charge "might not" become known is no answer to the assertion that the public nature of the accusation distinguishes it from a secret indictment which cannot be revealed. Moreover, the argument that misdemeanor charges may not generally become public knowledge is remarkable and ironic coming, as it does, from a prosecutorial agency which has released the names of people arrested for misdemeanor offenses for publication by the media (Los Angeles Times, 12/3/82, Pt. II, pg. 1), and which prosecutes offenses in a County where the District Attorney has also publicized the names of people for whom warrants of arrest have been issued on minor offenses. (Los Angeles Times, 10/17/84, Pt. I, pg. 3.)

every other decision ever issued on this subject. Petitioner can cite to no contrary opinion whatsoever.

Finally, petitioner's attempt to show that the California Supreme Court (and by extension, every other court in the United States) has departed from controlling authority of this Court is equally unavailing. Petitioner struggles mightily to create an ambiguity in this court's opinion in United States v. Marion, supra, 404 U.S. at p. 320.) (Pet., pp. 11-12.) Yet this ambiguity has been discovered by no court of which respondent is aware. It is manifest that this court's determination in Marion was that one of two events activated the protections of the Sixth Amendment: arrest or the filing of formal charges. Although petitioner attempts to reconstruct this court's opinions into a holding that the filing of charges does not activate those protections unless the defendant is also arrested, this court has made it certain that it is only "when no indictment is outstanding" that the actual restraints of

arrest are necessary to invoke the protections of the Sixth Amendment. (United States v. Loud Hawk, supra, ___ U.S. ___ [106 S.Ct. at p. 654.) This court has also repeatedly held that the protections of the Sixth Amendment apply while "charges are pending." (United States v. MacDonald, supra, 456 U.S. at p. 7.) 2/

Petitioner does not dispute the holding of the California Supreme Court that a misdemeanor complaint is a formal accusatory pleading. Indeed, it would be impossible for petitioner to do so, since the misdemeanor complaint is the only charging document which

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2 Petitioner's confusion regarding this Court's opinions may be based upon petitioner's misapprehension that there are only two interests protected by the speedy trial provisions of the Sixth Amendment. (Pet. pp. 8-10.) Of course, there are three interests which are considered to determine prejudice: (1) prevention of oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired. (Barker v. Wingo (1972) 407 U.S. 514, 532; United States v. Williams (1985) ___ F.2d ___ [9th Cir., No. CR 80-192-FR, 11/13/85.) Further, as this Court has emphatically stated, a showing that any of these interests has actually been affected by delay is not necessary to assert a speedy trial claim. (Moore v. Arizona, supra, 414 U.S. 25, 26.)

exists in misdemeanor cases in California. Moreover, this court has repeatedly emphasized that a defendant should look to the statute of limitations for his protection against undue delay before the filing of charges, and to the Sixth Amendment after such charges are filed. (See United States v. Marion, supra, 404 U.S. at p. 323; United States v. Lovasco (1977) 431 U.S. 783.) It would certainly be anomalous for a State to provide for a document, the filing of which would satisfy the statute of limitations, but would not activate Sixth Amendment protections. Under California law, the statute of limitations is satisfied by the filing of a misdemeanor complaint. (Cal. Pen. Code § 804, subd. (b).) Thus, the misdemeanor complaint is an accusatory pleading, the filing of which activates the protections of

the Sixth Amendment. 3/

Thus, petitioner has utterly failed to show that this court's jurisdiction to grant certiorari in this case would be properly

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3 If this Court does grant certiorari in this case, this Court may desire to address the question of what sort of document qualifies as an accusatory pleading. Respondent would submit that, in light of this Court's rulings regarding the interplay between the Sixth Amendment and the statute of limitations, an "accusatory pleading" should be defined as that document which satisfies the statute of limitations. The rule in California is presently to the contrary. The filing of a felony complaint and the issuance of an arrest warrant satisfies the statute of limitations. (Cal. Pen. Code § 804, subd. (d).) However, that document is not considered an accusatory pleading within the meaning of the Sixth Amendment. (Serna v. Superior Court, supra, 40 Cal.3d at p. 257; App., A-22 to A-23.) Thus, an unreasonable period of delay may follow the filing of a felony complaint and the issuance of an arrest warrant during which the defendant is protected by neither the Sixth Amendment nor the statute of limitations.

exercised under either Rule 17.1(b) or 17.1(c). The opinion of the California Supreme Court is not in conflict with any other State court, nor with any federal court of appeals. Instead, that opinion is in harmony with every other State court, and with every federal court of appeals which has considered the subject. Further, the decision of the California Supreme Court is not contrary to any decision of this Court, but is instead compelled by applicable authority. Accordingly, certiorari should be denied.

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II

A STATE COURT MAY ADOPT AN ABSOLUTE TIME LIMIT BEYOND WHICH UNJUSTIFIED DELAY IS PRESUMED TO VIOLATE THE SIXTH AMENDMENT

The California Supreme Court has ruled that a delay of over one year following a defendant's accusation of a misdemeanor offense shall be presumed to be a violation of the right to a speedy trial, entitling the defendant to dismissal if the delay is not justified. (Serna v. Superior Court, supra, 40 Cal.3d at p. 702b; App., A-55 to A-56.) Respondent readily admits that the discussion of this point is ambiguous, and under some constructions may be contrary to authority of this Court. For example, if the ruling of the California Supreme Court is that there can be no violation of the Sixth Amendment if the delay is less than one year, then this holding is contrary to the determination of this court that Sixth Amendment violations

can be based upon shorter delays. (See Barker v. Wingo (1972) 407 U.S. 516, 530-531, and nb. fn. 31, noting that a constitutional depravation could be found from a delay of nine months.)

However, appellate opinions should be interpreted in such a manner as will lead to a constitutional construction, not an interpretation which would lead to their invalidity. In that regard, respondent notes that although this Court has declined to quantify the Sixth Amendment speedy trial right into a specific number of days or months, this Court has also ruled that "The States, of course, are free to prescribe a reasonable period consistent with constitutional standards . . . ." (Barker v. Wingo, supra, 407 U.S. at p. 523.) Further, it is established federal law that if a delay is lengthy and unjustified, actual prejudice to the defendant may become irrelevant. (Hoskins v. Wainwright (5th Cir., 1973) 485 F.2d 1186, 1192.)

Properly considered, all the California Supreme Court has done is set an outside limit for unjustified delay in a misdemeanor case. If the delay has been for over a year, and the prosecution presents no evidence of justification, then prejudice becomes irrelevant (or, in the words of the California Supreme Court, it is "presumed"). Thus, an unjustified delay of over a year must result in dismissal of the charge. However, consistent with the authority of this Court, a defendant must still be able to challenge delay of less than a year, in which case an absence of prejudice may weigh in the balance against the defendant. Further, if the prosecution can demonstrate justification for a delay of over one year, then again the court engages in the mandated balancing test.

It may thus be seen that, properly interpreted, the opinion of the California Supreme Court does not conflict with authority of this Court. This Court should not presume that the Sixth Amendment will not be properly applied by the courts of California,

nor that the present opinion will be interpreted by those courts in a manner inconsistent with the rulings of this Court. If the courts of California do depart from the standards set forth by this court, keeping in mind the freedom granted by this Court to the States to develop means to enforce the Sixth Amendment, then this Court will surely have the opportunity to review such a development in the future. Accordingly, certiorari should be denied in the present case.

CONCLUSION

The rule that a criminal defendant is an "accused" within the meaning of the speedy trial guarantee as soon as the formal charging document has been filed against such defendant is well-settled in the law of the United States, and of the several States. Petitioner does not cite a single opinion to the contrary. Instead, petitioner asks this Court to overrule its own prior opinions rendered on this subject, and effectively

overrule literally hundreds of rulings from State and federal courts which have relied upon this Court's statement of the law.

Petitioner does not provide this Court with any persuasive reason why this Court should now abandon at least 15 years of precedent. Accordingly, this petition for writ of certiorari should be denied.

Respectfully submitted,

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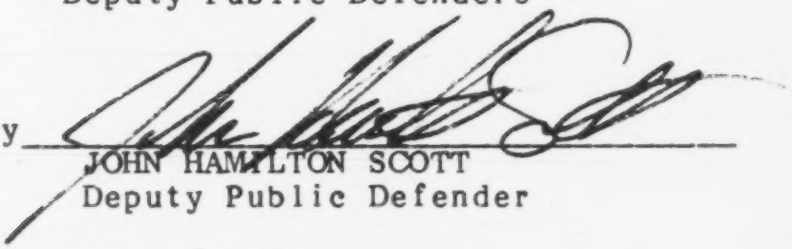
OF LOS ANGELES COUNTY, CALIFORNIA

Laurence M. Sarnoff,
Philomene J. Swenson,
John Hamilton Scott,
Deputy Public Defenders



By _____
JOHN HAMILTON SCOTT
Deputy Public Defender

Attorneys for Respondent

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Los Angeles, California. I am over the age of 18, an not a party to the within action. My business address is 210 West Temple Street, 19th floor, Los Angeles, California 90012.

On March 7, 1986, I served the within Brief of Respondent in Opposition to Petition for Writ of Certiorari (California v. Serna, No. 85-1365), upon the following parties by placing three (3) copies thereof in a sealed envelope with postage fully prepaid in the United States Post Office mail box at Los Angeles, California, addressed as follows:

CLERK
CALIFORNIA SUPREME COURT
4250 STATE BUILDING
350 McALLISTER STREET
SAN FRANCISCO, CA 94102

CLERK
CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION FOUR
3580 WILSHIRE BOULEVARD
LOS ANGELES, CA 90010

CLERK
LOS ANGELES COUNTY SUPERIOR COURT
DEPARTMENT 70
111 NORTH HILL STREET, ROOM 607
LOS ANGELES, CA 90012

PRESIDING JUDGE
LOS ANGELES COUNTY SUPERIOR COURT
111 NORTH HILL STREET
LOS ANGELES, CA 90012

PRESIDING JUDGE
LOS ANGELES MUNICIPAL COURT
110 NORTH GRAND AVENUE
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All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7th day of March, 1986, at Los Angeles, California

Madeline C Boal

MADELINE BOAL